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DIVISION OF REVIEW

MANUFACTURERS CONTROL OF DISTRIBUTION: A STUDY OF TRADE PRACTICE PROVISIONS IN SELECTED NRA CODES

By
Irwin S. Moise
George B. Haddock

WORK MATERIALS NO. 62.

TRADE PRACTICE STUDIES SECTION
March, 1936

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FOREWORD

This study of manufacturers' control of distribution was prepared by Messrs. Irwin S. Noise and George T. Haddock of the Trade Practice Studies Section, Mr. Corwin D. Edwards in charge. It also contains case studies on particular industries by Clayton Gehman, A. A. Kimball, L. E. Lovell and J. W. McNally, respectively. One of the Appendices was prepared by L. L. Shirley.

This study is an examination of manufacturers' distribution control efforts, the motives underlying them, to what extent such programs were incorporated in codes, and the degrees of success under code administration. The study is limited to thirteen codified industries.

The cases studied fall into three groups: (1) attempts to eliminate intermediate distributors: (2) attempts to control intermediate distributors while selling in competition with them; and (3) attempts to maintain the position of the intermediate distributor as the exclusive means of marketing industry products.

Part A of the report states the character of the manufacturers' problem of distribution and contains a cross-section account of experience in the thirteen cases studied. Part B consists of detailed case studies of five of these industries. The Appendix contains case material for three additional industries and lengthly supporting data for one of the studies in Part B. The distinction between the studies included in the report and those placed in the Appendix is that the latter are the cases in which it has not been possible in the time available to assemble the material necessary for complete studies or to complete an analytical presentation of the material at hand.

The study shows the varying degrees of success and failure attending the policies that were tried out. Evaluation of the broader public policy problems growing out of the programs studied is beyond the scope of this work.

The sources of information have in general been the NRA files; transcripts of hearing; and briefs and letters from trade associations, members of industry, code authorities and others covering the period of code formulation and administration. Further research is desirable not only with reference to the incomplete studies in the Appendix but also with reference to other manufacturing industries not included in the thirteen investigated.

At the back of this report will be found a brief statement of the studies undertaken by the Division of Review.

L. C. Marshall
Director, Division of Review

March 20, 1936

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SUMMARY

I. MANUFACTURER CONTROL OF DISTRIBUTION.

The initial step in the consideration of manufacturers' efforts toward the control of distribution is an inquiry, from the manufacturer's viewpoint into the advantages and disadvantages of the methods which may be used in marketing. The merits of direct sales to consumers and to retailers, of sales through wholesalers, and of combination of these methods, are discussed from that viewpoint. The conditioning effect of the particular producer's reliance upon price appeal or upon quality and brand reputation based on advertising, and of the relation of price to direct costs, is emphasized in order to demonstrate the many circumstances which must be considered by the manufacturer in reaching a decision as to the distribution policy which he will pursue.

Of equal importance to the manufacturer is the decision on distribution policy which his competitors reach. Should the impact of rival policies disrupt his own system, the manufacturer is in a helpless position, for his program must then be shaped not from his own view view but from a situation developed from the views of others. To reduce this possibility to a minimum attempts are made among industry members to unite on a common viewpoint and to the largest extent possible to reach an agreement as to the type of distribution policy which should be used. The first aim is to seek union of industry members; when that has been attained the industry can consider the possible distribution policies open to it and strive to make a selection based on the best interest of the entire industry.

There are three distinct policies from which the industry may make its choice. First, there is one designed to eliminate distributors and express the industry's opinion that it can depend entirely upon direct sales. Second, there can be effected a joint use of direct sales and sales through distributors, the particular combination being determined by the degree to which either is given preference. Third, there can be recognition of the primary value of distributors with a consequent effort to preserve and protect them in their function. On the basis of their emphasis upon one or another of these alternatives the thirteen industries studies by this Unit are arranged. Under such arrangement follows a particularized treatment of each industry's background, factors governing choice of policy, and effectiveness of the Code program, this representing in each case a condensed and summarized version of the facts presented in fuller detail in the Exhibits.

From this presentation of industry experiences under programs based on the various policies, it becomes at once apparent that successful operation was not uniformly achieved under any one policy. In the industries adopting each policy some programs were successful and some were failures. An analysis of the common characteristics of the successful and unsuccessful industry programs leads to the conclusion that those industries which had the greatest measure of uniform acceptance, whether through identity of interest, compromise, or even passive acceptance of the superior power of the dominant industry group, fared best; and where

such unity was lacking, there followed a breakdown in the absence of NRA support.

The degree of success, however, is less important than the public policy problem centering on the desirability of the distribution program. The present study is limited to an analysis and interpretation of industry efforts at regulation, but with such analysis, major policy questions suggest themselves.

II. INDUSTRY CASE STUDIES OF TRADE PRACTICES AFFECTING CHANNELS OF DISTRIBUTION AND MARKETING METHODS

A. Salt Producing Industry.

The Salt Industry is composed of few establishments and to a large extent is dominated by two concerns. Due to the fact that the product is standardized and the potential sales limited by the characteristics of the product, price competition affords the primary medium for the expansion of the individual producer's sales. When the industry has attained uniformity of published prices, cutting by means of secret rebates and concessions to distributors has always brought reversions to the original price warfare. Although some manufacturers have initiated a trend toward direct sales to lessen dependence upon distributors, and incident to this have discontinued the trade discounts to jobbers, it has always been vital to other manufacturers that they retain the flexibility of their distributors, and the latter type of producer frequently acts in such a way as to sabotage the plans of the majority group.

The Code program was looked upon by the industry as a means of securing the price uniformity it had sought so long. Published prices were to be uniform, and price cutting by distributors limited through an expansion of direct sales with a discontinuance of the sale of bulk salt to resellers. It was contemplated that competition with distributors on price would remain only in a very minor area of the industrial salt market and in the wholesale less-than-carload market on table salt. Except for the retail market in table salt, which was to remain undisturbed the manufacturers, through their cohesion in selling direct, would exercise control over the distributive process in the other main divisions of the market. The program was extensive, and was aimed to accomplish the ends which in previous experience had not been attainable because of lack of control over a minority group; in this case the dominant group relied heavily upon NRA's enforcement of its plan.

The Code program did begin operation and did operate as intended for a period, but when the smaller industry members felt its impact and realized that compliance would not be enforced, their conformance ceased. The price uniformity was beneficial to one group at the expense of another, and the latter chose to break away from the plan rather than suffer injury. The NRA failed to force these violators into line in the interest of the dominant group, and the Code experience of the industry produced finally its most bitter price war.

B. Wood Cased Lead Pencil Manufacturing Industry.

The Wood-cased Lead Pencil Manufacturing Industry has been dominated

until recently by four large manufacturers acting in concert - the so-called "Big Four". Within the last few years there has formed an opposition group of four companies located in Tennessee, which, although vastly inferior in size, through price competition have gradually increased their sales at the expense of the Big Four. Although the latter have maintained their collective dominance over the small companies in the industry generally, they have been unable to dominate these new competitors or to reach any compromise with them. The Code program was therefore an effort by the Big Four to place the new manufacturers in a less advantageous position.

The Tennessee companies had found ready acceptance of their lower-priced product from the large chain buyers who, by the very immensity of their consumption, to a large extent subsidized the manufacturers. The Tennessee group was also finding acceptance of its product widespread among the small retailers who desired a lower-priced pencil. To accomplish the business of uprooting these opponents the Big Four's Code program called for extensive police and compliance activity on the part of NRA to overcome the resistance which would inevitably arise.

The Big four presented a plan whereby the Tennessee group would be required to raise the prices charged for its pencils, adversely affecting their sales to chain stores. The abolition of trade discounts to wholesalers (on whom the new manufacturers relied for assistance in selling to small dealers), and minimum quantity restrictions, would have prevented the new members from expanding their sales to the small-retail market. The program obviously required NRA assistance, and the NRA , far from expressing willingness to police the plan, refused to approve many important features. The Tennessee group organized its resistance at once and made it obvious that only by the most severe compulsion could it be forced to accept the program.

C. Cork Industry.

The Cork Industry operates to a large degree under the direction of one manufacturer, the only companies capable of contesting this superiority having long since assumed the position of satellites. This group had attempted to formulate a Code program which would accelerate the process of replacing dependence upon independent distributors with reliance on direct selling methods. Since there was no disposition or ability on the part of smaller manufacturers to enter into extensive preparations for direct sales, and every intention of continuing to use independent distributors was expressed, the dominant group made plans to secure control over these distributors while expanding their own direct sales agencies. There was contemplated a reduction in the discounts to independent distributors below those granted to controlled distributors, with a consequent reduction of their operating margin; plus a requirement that resale prices be adhered to. Here, however, opposition arose, for some manufacturers saw that to follow leadership in this instance would constitute a movement in the direction of eventual oblivion; the independent distributors, except for those which could exist on exclusive agencies, foresaw a similar fate.

There was insufficient power on the part of the code proponents to

impose their will on the opponents, and active NRA assistance was required to make the program operate successfully. Although the opponents of the Code program were greatly in the minority they were able to block approval of the program by the NRA.

D. Asbestos Industry.

In the Brake Lining and Related Friction Products Division of the Asbestos industry, in years prior to 1929, there had been a fairly high degree of unity among brake lining manufacturers. Cohesiveness of action and purpose had been disturbed by the entry into the industry of a large number of new producers between 1929 and 1933. New entrants into the industry were encouraged by the increasing margin between stable consumer price levels and falling raw material prices. These new producers needed distribution outlets, and many utilized the wide margin between consumer prices and raw material costs to bid for the services of distributors through increasing discounts. This practice was met by the older producers, who suffered from the new competition and from the decreased demand for the industry products. Increasing discount competition became a serious form of price cutting in the industry, and one of the primary purposes of the code program was to eliminate this form of price competition.

The program involved mandatory customer classification, fixed discounts, standard price lists, minimum "cost floors" to different types of buyers, and resale price maintenance contracts. Smaller manufacturers were permitted to sell at prices under those of larger manufacturers.

During the code period, raw material prices increased sharply, reducing the margin from which manufacturers had been granting large discounts to buyers, and this fact promoted a general desire on the part of manufacturers to reduce discounts to distributors as far as possible. Larger producers were generally satisfied with the code program, which did not interfere with their method of securing access to the market; and either the smaller members, if not entirely satisfied with their price differential, believed that they would be as well off under the code program as under any other circumstances, or else their deviations from the program were so unimportant as not to interfere materially with its operation.

The code program evidently was not designed to promote the interests of any one group or type of manufacturer to the appreciable detriment of others; and through general acquiescence it operated in a fairly successful manner in accomplishing the aims of the proponents. The NRA refused to give its approval and support to several of the more important provisions, and the success of the program was attributable to industry cooperation.

E. Plumbing Fixtures Industry.

The Plumbing Fixtures Industry is composed of a great many manufacturers producing a variety of products in either short-line or full-line fashion. However, three companies, each of which produces a full line and has by advertising created widespread consumer acceptance of its product, dominate the industry. These manufacturers have promoted

their ability to sell direct to plumbing contractors and have gained a position of considerable importance in the field formerly the exclusive realm of independent wholesalers. To keep abreast of this development the smaller manufacturers have also attempted to sell direct to retailers instead of through a distributor intermediary, and also direct to large consumers.

This incursion by manufacturers into the wholesaler's field was to the disadvantage of the independent wholesalers. The retailer suffered likewise through mail order sales of fixtures, for the plumbing contractor had depended for profit as much upon sales of fixtures as upon installation charges. The large manufacturers, realizing their dependence upon both these elements in the distribution process, came to the decision that they should protect independent distributors. A Code program was drawn up whereby manufacturers would share the wholesalers' field on a level of strict equality, (in return for which independent wholesalers were to abide by manufacturers' resale prices), and the retailer would be allowed to function with more protection against price competition from other quarters. To attain this end the proponents were willing to forego sales to mail order houses unless the latter would relinquish their former preferential discounts and accept the status of wholesalers.

It was easier for the large and dominant industry members to make this decision than for the smaller members, for it was the latter who had the largest proportion of sales to mail order houses. This group also did not have wholesale agencies of their own and had to depend upon the wholesalers who were now to come under the proponents price control plan. The equality and opportunity for all which the Code program claimed was its object was to be established on a plane more beneficial to the large industry members. The realization of this fact was not slow in coming to the smaller producers.

It had been expected by the Code proponents that, granted approval of the program, recalcitrants would be forced into compliance by NRA. Unfortunately for them, their hopes were unfounded in both cases, for NRA did not approve certain phases of the program and proved ineffective in enforcing what provisions it sanctioned. The Code program had aroused such deep-seated antagonism on the part of the smaller producers that it was impossible for the industry to operate under the plan.

PART A

MANUFACTURER CONTROL OF DISTRIBUTION

PART A - MANUFACTURER CONTROL OF DISTRIBUTION

CHAPTER I*

INTRODUCTION: CHARACTER OF MANUFACTURER'S DISTRIBUTION PROBLEM

I. SCOPE OF THE INQUIRY

The regulation of distribution was a matter of central attention in NRA codes of fair competition and in the negotiations and controversies surrounding them. The importance of the subject is clear when it is recognized that the conflict of competitors culminates in the market, and trade practices in the market are of vital importance in determining the result. The problems of distribution include the efforts of various industry groups and factors to govern or influence distributive trade practices such as the efforts of retailers to curb loss leaders; the efforts of wholesalers to preserve their function by the establishment of mandatory trade differentials; and the efforts of manufacturers to regulate the distribution of their products not only in the primary market but in each stage of distribution to the ultimate consumer.

The present study is limited to the latter subject, the efforts of manufacturers to regulate the distribution of their products, and particularly with the relation of NRA codes of fair competition for these manufacturers to such efforts. The inquiry into proposed and effected regulations embraces an examination of the distributive problems facing the manufacturer or manufacturing industry, the alternative possible solutions, the policy adopted and devices used, and their operation and effects, or the effects implicit in the policy and devices employed. It has been possible to study only 13 industries, but even with a limited sample, the inquiry has developed a range of actions and apparent motives which it is believed reveal the essential character of the manufacturer distribution problem.

II. THE MANUFACTURER'S DISTRIBUTION PROBLEM

The manufacturer's distribution problem embraces not only his relations with other manufacturers in the market, but his relations with wholesalers and retailers through whom he sells and with whom he is in competition if he sells directly to retail stores or to the consumer. The present study is focussed on manufacturer relations with wholesalers and retailers, although it is not possible to separate completely this part of the subject from that of the relations of manufacturers to each other, and this latter subject is touched on to the extent necessary to illuminate the problem of relations with distributors.

(*) This Chapter was written by Francis A. Staten

In the modern market the manufacturer has alternative channels through which he may distribute his product. He frequently sells directly to the consumer through his own retail stores; he may sell directly to retailers only, or he may rely on wholesalers to get his product to retail stores. If he elects to sell directly to retailers, he has a further problem: to what type of retailer will he cater, chain store, mail order house, department store, or independent.

Many manufacturers find it most advisable to distribute through a combination of the above-mentioned channels. A portion of sales will be direct to retailers, a portion through wholesalers, and a portion direct to the consumer, particularly large industrial consumers and public institutions. They may elect to sell mail order houses and chain stores direct and independent retailers through wholesalers; they may elect to distribute entirely directly in certain markets where the density of sales is great, and indirectly through wholesalers in others where sales are relatively few and scattered.

A fact which a manufacturer must face in making his choice of distribution channels is the very serious conflict of interest which exists among them. A choice of dependence on one channel is almost certain to result in a falling off in degree of cooperation from those engaged in competing channels. Further, and very important to the present study, the choice among methods of distribution cannot be made without careful regard to the methods employed by other manufacturers. A policy which may be very good for one manufacturer considered by himself, or for an industry in cooperation, may be very dangerous to the individual manufacturer if applied without regard to the practices of competitors. It was experience with this last difficulty that made industry groups eager for a uniform industry-wide regulation of distributive practices apparently made possible by the NRA.

Closely related to the manufacturer's decision as to his most profitable channel of distribution is his decision as to a general price policy for his product; that is, to what extent will he compete upon a price basis and to what extent upon a product-differentiation basis through development of a brand name supported by direct advertising.

Both in the choice of a price policy and in the choice of channels of distribution, a manufacturer is obviously anxious to insure his position in the market. His position is strengthened to the extent that he can increase the dependence of the consumer upon him and decrease the threat of competition leading to price reductions and loss of business.

Whichever price policy a manufacturer has selected, he must seek its application not only in sales by himself to intermediaries, but in each step to the consumer. If he chooses to compete on a price basis, it is presumably because he believes he can best promote his own security in that way. This policy assumes a faith in his ability to produce and distribute his product at a cost and price lower than his competitors. To effectuate the policy, not only must production be at low cost, but also distribution must be at a low cost if the price to the ultimate consumer is to attract the necessary trade.

It should be noted here that competition on a price basis has become more and more difficult for manufacturers as fixed costs have increased with the increased use of machinery in large scale production. Competition on a price of efficiency basis requires that there be an advantage in costs through greater economies in buying materials, in manufacturing and selling. With the change in the structure of costs typical of so many industries in the modern market, however, the most intense price competition is likely to come from a competitor whose prices are based on his direct costs, the overhead costs being inescapable for long periods of time. Efficiency is measured in total costs, whereas price is likely to be on the basis of direct costs. When competition is intense, an inefficient competitor selling on the basis of direct costs to keep a hold on the market is a menace to the most efficient producer for as long as his capital and his consumer goodwill will last; and perhaps indefinitely if there is good financial support from affiliated companies or banks.

If the manufacturer turns away from price competition because of its threat of insecurity, he seeks to remove his product from competition by differentiating it from all others in the minds of consumers. He develops a brand name, advertises in newspapers and magazines, with the purpose of creating such a consumer acceptance and demand for his product, in preference to all others, that the consumer cannot be diverted to competing products on the basis of price alone. If this is his choice, he cannot stop with the direct advertising alone; he must carry through by making certain that the product is promoted on a brand and quality basis through each distributive stage. Cooperation of wholesalers and retailers in capitalizing on the direct advertising is necessary.

It is clear that whatever the general sales policy, it must be carried through the manufacturer's primary market to the wholesale and retail markets. In these secondary markets, the manufacturer has a choice of channels, and presumably his choice will depend on his evaluation of the advantages and dangers of each. There follows an examination of the manufacturer problems incident to the choice of (1) direct selling; (2) dependence on intermediary wholesalers and retailers; or (3) a combination of direct sellinf and dependence on intermediaries. These problems differ according to whether the manufacturer is selling on a price basis or a brand or quality basis and these differences are therefore covered in the consideration of each of the three heads.

A. Problems Incident to Direct Selling

1. Direct Selling to Consumer

(a) On a Price Basis

If the manufacturer elects to sell direct to the consumer and compete on a price basis, he must be efficient not only in his manufacturing function but in the functions which would otherwise be performed by the wholesaler and the retailer. Therefore, he is exposed to the competition not only of other manufacturers but also of wholesalers and retailers distributing the products of other manufacturers. He must expect that he can perform the retailing function

more cheaply than specialized mass retail distributors, such as chain stores and mail order houses. He is therefore exposed not only to prices on the basis of direct cost by manufacturers, but also to the risks which may accompany the use of aggressive loss leader merchandising by distributors on other manufacturers' products. If the manufacturer is able to cope with competition on each of these levels, because of superior efficiency or resources, he can expect to be fairly secure in his market; but such is seldom the case.

(b) On a Brand Basis

Where a manufacturer chooses to sell his product on a brand basis differentiating it in the customer's mind from other products by means of direct advertising and acceptance of the brand name, and where he takes to himself the entire merchandising function to the ultimate consumer, he has the advantage of being able to take the fullest advantage of his direct advertising through intelligent capitalization of its results by the retail store. However, to the extent that the differentiation is not complete, and it seldom can be, he is exposed to the competition of other manufacturers' products sold on a price basis sufficiently below his own price to attract away customers. It should be noted that the dangers of price cutting on competing products may arise both in the primary market for such competing products and in the secondary markets. That is, competing manufacturers may make their initial sale on a price basis, and distributors likewise may use the product aggressively on a low price basis at small unit profit, or even as a price leader.

2. Direct Sales to Retailers

(a) On a Price Basis

When a manufacturer elects to sell his product to retailers, relying on price appeal, he is exposed to the competition of other manufacturers and wholesalers. Here again, if his industry is one characterized by relative high overhead charges, price competition when most intense will be on the basis of direct cost rather than total cost as will the measure of efficiency. Further, on a price basis it is very probable that the best outlets will be aggressive merchandisers such as department stores and mail order houses. If he sells to these, he is unlikely to find much interest in his product on the part of independent retailers, with the result that mail order house, chain, or department stores outlet tends to become the exclusive possible channels. In this case his position may become precarious by reason of dependence upon such powerful retail organizations who, as a consequence of that dependence, are in a very strong bargaining position enabling them to exact a low purchase price.

(b) On a Brand Basis

If sales are to be on a quality basis and the policy is direct selling to retailers, the margin to the retailer on the product must be such as to induce their fullest cooperation in capitalizing on the advertising and consumer acceptance. This necessarily high margin, added

to the cost incident to product promotion by the manufacturer, makes necessary a high retail price. To the extent that differentiation is not complete and consumers can be attracted away by a large price differential, the product is exposed to price competition. Further, once a product is established in the market, the interest of chain stores and department stores in it increases. The patronage of these outlets is very desirable to a manufacturer because of the large volume moving through them, and for the reason that this type of retailer is aggressive in its promotion of a product. However, if these outlets are sold, and the product is used as a price leader or sold at a very small profit, the interest and cooperation of independent retailers declaines, probably even to the extent of a virtual boycott. The retail interest failing and dependence upon mass distributors increasing, the manufacturer is again in danger of being subordinated in bargaining power to the latter. *

B. Selling Through Wholesalers

1. On a Price Basis

Sales to wholesalers on the basis of price appeal involve no assurance that the low price to the wholesaler will be passed on to the retailer, and by him to the consumer; and successful competition on a price basis requires aggressive low margin merchandising in the wholesale and retail markets. In the case of direct sales to retailers, the best use of price appeal is by aggressive mass distributors. Moreover, aggressive price competition by the wholesaler may well lead to unusual pressure by the wholesaler for lower prices to enable him to continue his price competition, and to the extent that he is able to play manufacturers one against the other, he may be able to drive prices to the level of direct costs. Another possibility also presents a danger; that is, the disappearance of the wholesaler margin through aggressive price competition may cause him to lose interest in the product entirely, turning to development of his own wholesaler private brand, or to advertise differentiated products.

2. On a Quality Basis

The policy of product differentiation through brand development combined with use of wholesalers or jobbers for distribution, requires that there be a margin adequate to interest wholesalers and secure their cooperation. The product must be removed from price competition. Wholesalers must be protected from each other's price cutting on the margin if they are to retain interest in the product. This requires

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(*) It should be noted that merchandising on a brand basis may proceed on the policy of avoiding price competition as to the retail price, but accepting price competition in the intermediary market; i.e., manufacturer net price may be reduced by extending larger discounts to intermediaries, with the condition that the increased margin be devoted to sales promotion rather than price cutting. This practice, however, is only an incident in a brand promotion program looking to ultimate greater profit through enlarged demand for a differentiated product. The policy is exposed to the dangers above described.

resale price maintenance in the wholesale market with all of the enforcement difficulties that surround that device. Moreover, the manufacturer has no assurances of the wholesaler's efficiency in promoting the product; a difficult educational task confronts him. And again there is the temptation to sell to mass distributors to secure the additional volume. If this is done, the interest of the wholesaler is likely to wane; it may even subscribe to a wholesaler boycott of the product. Added to the above difficulties is the threat of price competition from similar products of other manufacturers, sold on a basis sufficiently low to nullify the differential advantage.

C. Combination of Direct Selling and Selling Through Distributors

1. On a Price Basis

The combination of sales directly to retailers with sales through wholesalers on a price basis immediately places the manufacturer in active competition with his own wholesaler customers. In addition to facing competition in their specialized field, he risks gaining their ill will. In fact, to the extent that he is dependent on distributors for distributors for distribution of part of his product, it is probable that he will be obliged to turn to aggressive price merchandisers such as mail order houses and chain stores in which he is again faced with the threat of their powerful bargaining position. Added to these difficulties, of course, is the constant threat of price competition from the products of other manufacturers. (The same problems as set forth above apply to a combination of direct sales to ultimate consumers with sales through intermediaries.)

2. Combination of Direct Selling, Selling Through Distributors on a Brand Basis

Where the manufacturer distributes a part of his product direct and must rely on wholesalers as to the remainder, he must maintain a wholesaler margin sufficient to secure cooperation. Further, he must protect that margin by some form of resale price maintenance to prevent the distributor from using a part of the margin for price reduction. Price maintenance is necessary in this case to protect not only the interest of other distributors, but the position of the manufacturer himself in the wholesale market. If he is successful in maintaining resale prices in the wholesale market, there still remains the threat of price competition from the products of other manufacturers sold on a price basis.

It is apparent that whatever price policy the manufacturer adopts and whichever channel or channels of distribution he elects to favor, he is confronted with various threats to his position in the market. The analysis shows that the manufacturer individually may be able to solve some, but not all, of his difficulties. For example, direct selling eliminates dependence on distributors; where he shares the market with the distributor, he may maintain resale prices by refusal to sell to price cutters. It is apparent, however, that two major threats run through the entire range of distribution policies and neither of these can be completely met by the manufacturer as an individual. On the other hand, policy of price competition carries with it the threat of low prices tending to the level of direct costs, either through the competition of other products, or through exposure to the superior bargaining power of mail order houses, chain stores and department stores. On the other hand, the policy of product differentiation with relatively high prices is continually threatened by price competition on a level low enough to erase the differential advantage; because differentiation in product usually runs in terms of ability to command a somewhat higher price but not a complete monopoly of demand.

Price competition is the fundamental threat to the desired power in the market in each case, and if the manufacturer is to realize the wished-for power and security, price competition must be limited.

III. MANUFACTURERS INCENTIVES ARE TOWARD UNITED INDUSTRY ACTION

Where a manufacturer is operating both in the primary market and in the wholesale and retail markets, that limitation to be effective must apply in each of those markets. This limitation he cannot affect as an individual; control of price competition is a problem which extends beyond the individual manufacturer's sales policy and relations with his own distributors. To have such control there must be agreement among manufacturers or some coercion which establishes a unity of practice. Having achieved a common front among themselves, they may first direct their attention to a limitation of competition among themselves in the primary market, proceeding then to a control of distributive relations in the secondary market. It is also possible that control in the primary market is dependent upon a control of the secondary markets, in which case a distribution program must be agreed on before the control of the primary market is effected. But even in this case there must be an understanding among at least the dominant manufacturing group as to the need for such control and its relation to the primary market. Manufacturers will want control of the wholesale and retail markets if they are selling directly to retailers or consumers, and particularly if those sales are based upon a policy of high prices through product differentiation and brand development. They may want such control if they are dependent upon independent distributors for distribution and those distributors are powerful enough to demand protection from mail order houses or other aggressive merchandisers.

It should be noted here that if distributors are powerful they must be parties to the program agreed on, which further complicates the problem of unity of action.

The extent to which a manufacturers' program is successful in promoting their aims will depend upon the degree of unity achieved. There are several ways in which acceptance of a common program may be effected. First, there may be a voluntary acceptance of an industry program by all parties. It is possible, although not likely, that a complete identity of interests among manufacturers would lead to this result. It is more likely, however, that the voluntary agreement would be based upon a compromise between manufacturers wishing to follow differing distribution policies. For example, small manufacturers distributing on the basis of price appeal might agree with larger manufacturers distributing on a brand basis if specified price differentials were accorded them. Whatever the basis of agreement, the fact of agreement makes the success of the distributive program more likely than if coercion is relied upon. The major threat to success while the unity continues is the anti-trust law, and suspension of this becomes the prime requisite.

Second, uniformity of action may be achieved by the exercise of power by a dominant group or dominant concern in the industry having sufficient power and resources to dictate the practice to be followed. The degree of success in this case is in direct ratio to the absoluteness of the power of the dominant interest.

Third, there is a possibility of Government control of unwilling nonconformests such as was possible through the NRA. This is the most doubtful

route to unity. The Government, when it becomes aware of the motives underlying an industry regulatory program, particularly where the elimination of subordination of a type of enterprize is desired, will be very reluctant to lend its fiat.

From the above discussion, it is logical to expect that manufacturer programs for the regulation of distributive practices applying to the wholesale and retail markets are most likely to be advanced by manufacturing groups which have already achieved agreement among themselves.

IV. ALTERNATIVE INDUSTRY DISTRIBUTION POLICIES

Assuming agreement on the part of manufacturers as to the need for a common program of control of distributive relations, there are three general alternatives available to them. Which of these is chosen depends upon the degree to which manufacturers are selling or want to sell direct to consumers or retailers, and the extent to which as an industry they are dependent upon distributors. The alternatives are:

A. Reliance on Direct Selling. The manufacturers in this case proceed to appropriate to themselves either the entire market or a segregable part of it for direct sales. This involves the elimination of the independent distributor or at least such rigorous control over him as to practically eliminate him. There may be an outright refusal to sell distributors or such a limitation of their margins as to make it unprofitable for them to operate.

B. Combination of Direct Selling and Use of Distributors. This policy accepts a joint occupancy of the wholesale market by manufacturers and distributors. In such a case the distributors may be circumscribed in their price competition by mandatory regulation of resale prices and terms; otherwise the distributors would constitute a threat to the direct selling operations of manufacturers.

C. Dependence on Sales Through Distributors. This alternative constitutes abandonment of the wholesale and retail market to distributors. However, where the manufacturers are dependent upon distributors for their cooperation, the distributors must be protected from price competition among themselves, and particularly from the competition of mass distributors selling on a price basis.

The following chapter is devoted to a fuller description of these alternative policies and to an account of their use in particular manufacturing industries studied.*

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* Two supplementary comments are in order:

(1) The study is limited to an examination of manufacturers distribution control efforts, the motives underlying them, their operation and degree of success. Evaluation of the public policy problems following any degree of success in the programs is beyond the scope of the study. Obviously, the evaluation in broader terms is vital to any government decision as to the degree of tolerance or support to be given an industry effort.

The present study presents an interpretation of manufacturer distribution control attempts, the main value of which is to throw the public policy problem into relief.

To the extent that manufacturers are successful in their efforts to circumscribe distributive relations, with the concomitant limitation of price competition, freedom of competition in the market break down. The problem in public policy commences at this point. Shall the government refuse support to the effort or proceed vigorously against it if it is being done without government support? Shall it accept the manufacturer judgment against free competition, and, if so, with what public controls to insure a proper weighting of the consumer and minority industry interest in its effectuation? The issues immediately become very broad in character: stabilization of business against freedom of competition with its promise of low costs and prices through rapid introduction of new methods and liquidation of the old; the relative social value of efficiency through integration with control as against that of independent operation of a large number of small enterprises even with somewhat higher costs. Such problems are central to the distribution problem, but are in a forum beyond the scope of this study.

(2) It is apparent that the problem of this study as defined lies outside the framework of the older economic theory of the nature of market behavior. That theory, premised on the assumptions of a large number of buyers, large number of sellers, standardized product, knowledge of the market, and mobility of capital, excludes the possibility of sellers achieving dominant power over the market and escaping the impact of competition (aside from the theory of monopoly price). Assuming these conditions, it reasons that business men must act in accordance with the theories based upon them. Our observation is that business men in their actions seldom if ever accept these assumptions and the theory based thereon, and continually act in the belief that consequences quite different from those deduced are possible. It is apparent that to the degree their efforts are successful, the theory is inapplicable. Recognizing the inapplicability of the older theory to the inquiry, the present study presents an analysis of market behavior which is based on the observed actions of manufacturers with relation to distribution of their products.

CHAPTER II

MANUFACTURING INDUSTRY PROGRAMS FOR THE REGULATION OF DISTRIBUTION

I. DESCRIPTION OF ALTERNATIVE DISTRIBUTION POLICIES

The industry studies of this Unit indicate that attempts at the regulation of distribution by manufacturers, or attempts by manufacturers to promote or protect their access to the market at a profit, involved one of the three general policies described in the preceding chapter, or combinations of such policies.

The first included the appropriation for direct sales by manufacturers of all or a segregable part of the market, and the elimination of independent distributors from competition, either through the establishment of a direct selling organization or through control of distributors by agency, contract, or affiliation.

The second involved the joint occupancy of the market by direct selling manufacturers and by distributors, but with a manufacturer control of the prices and selling policies of the distributors.

The third involved the abandonment by all manufacturers of a particular market or a part thereof to distributors, thus eliminating competition between manufacturers and distributors in that market.

A. Policy No. 1

The complete adoption of Policy No. 1 - the appropriation by manufacturers of the entire market - could be accomplished by a prohibition of sales to distributors, or what amounts to the same thing, by making it impossible for distributors to sell to certain customers at prices as low as those granted by manufacturers to those consumers on direct sales. This could be accomplished by selling to consumers and distributors at the same or only slightly different prices, thus eliminating the margin upon which the distributor depends for continued operation. Since this would be feasible only where manufacturers were in a position to serve all consumers by direct sales, the complete adoption of this policy would not be practical for most industries. In the industries studied by this Unit, the commonest approach to Policy No. 1 was the manufacturer's appropriation of a segregable part of a market. The segment was made on the basis of quantity, or class of customer, or commodity, or combination of these bases.

Characteristic of an appropriation of a market on the basis of quantity was the substitution of quantity discounts for trade discounts, whereby all buyers, whether distributor or consumer, purchasing in excess of certain quantities, were enabled to secure the same price from the manufacturer. If the basis of the discount were

carload purchases, all carload buyers would receive the same price from the manufacturer, and the distributor would be given no margin on which to compete with manufacturers on sales to carload consumers. Thus, there would be an appropriation to the manufacturer of all sales over the specified quantity.

An appropriation by manufacturers on the basis of classes of customers would be accomplished by granting to certain classes of buyers lower prices than were granted to distributors, in which case the distributor would lose the business of those specified classes of customers. In this connection it should be noted that manufacturers might appropriate all or a part of the sales to retailers, without any appropriation of the consumer market. For example, manufacturers might elect not to sell to anyone in less than carload lots, but would allow all carload purchasers the same price. Thus, the manufacturer would not invade the consumer market (exclusively l.c.l. in certain industries) but would take from wholesalers all carload sales to retailers.

Appropriation of a part of the market on the basis of commodity - that is, the market for certain types of products only - would be accomplished by prohibiting the sale of certain commodities to distributors, or quoting to certain consumers lower prices on certain commodities than were granted on such commodities to distributors.

The most common kind of market segregation and appropriation appearing in the industries studied by this Unit, was on the basis of quantity and class of customers. That is, the manufacturers appropriated large quantity sales and sales to certain profitable types of customers. This was accomplished by giving to certain specified classes of customers prices on carload or other large quantities as low or lower than were given to distributors.

As has been indicated the industries studied which adopted the policy of manufacturer appropriation of a market appropriated only a segregable part of a market to which it was feasible for manufacturers to make direct sales. In each instance, a part of the total market, which for some reason the manufacturers considered it impractical or impolitic to reserve exclusively to themselves, either was left to distributors or was jointly occupied by both manufacturers and distributors. If the manufacturers elected to jointly occupy the unappropriated segment of the market with distributors, but attempted to exert some degree of joint control over the distributors, the program with respect to this unappropriated segment of the market would resemble Policy No. 2. If the manufacturers elected to leave the market entirely to distributors, the program with respect to this segment of the market would resemble Policy No. 3.

B. Policy No. 2

The adoption of Policy No. 2 - joint occupancy of all or a part of the market by distributors and direct selling manufacturers, with

some form of manufacturer control of the prices and selling policies of distributors - could be accomplished by a program in which manufacturers were given direct control of distributors (as for example in a vertical code dominated by manufacturers) or some form of resale price maintenance, mandatory or permissive.

A program involving Policy No. 2 was one requiring all manufacturers selling to distributors to refrain from selling to those distributors failing to enter into a contract whereby they would agree to resell only in accordance with the price and terms of the manufacturer. Several variations of this type of request were utilized. One principal distinction existed between the various programs involving Policy No. 2. Some of the programs extended protection to distributors in the form of adequate differentials or trade discounts, while other programs narrowed the margin on which distributors operated, or otherwise made the life of the distributor more difficult. To the extent that protection to distributors was given in any program, that program approximated Policy No. 3. To the extent that the distributor was handicapped in any program, that program approximated Policy No. 1.

C. Policy No. 3

The adoption of Policy No. 3 - abandonment by manufacturers of all or a part of the market to distributors - was effectuated in programs in which there was a definite relinquishment by manufacturers of the privilege of selling direct to certain classes of buyers, or the relinquishment of the privilege of selling direct in quantities under an agreed-upon amount. Generally included in programs under this policy was some form of protection to retailers against invasion of their market by wholesalers; in other instances protection was afforded against other retailers.

One or more of the above described policies was incorporated in each of the industry programs studies by this Unit. There were no instances in which there was a complete adoption of Policy No. 1 or of Policy No. 3. That is, in no industry program was there a complete appropriation of all distribution by manufacturers; and in no case was there a complete abandonment of all distribution to independent distributors. For the purpose of comparing the programs of the various industries studied by this Unit, it has been considered desirable to divide the programs into three general groups based upon their relation to the three broad policies above described. In making this grouping attention has been given to what appeared to be the direction in which the industry was moving, and to the relative importance to the industry of the various policies which may have been involved in its program. For example, an industry program involving the appropriation of a part of the market for direct sales by the manufacturer, and an abandonment of another part of the market to distributors, would be placed in Group 3 if it appeared that this program constituted a withdrawal from an important part of a market in which direct selling manufacturers had theretofore competed.

Or it would be placed in Group 1 if it appeared that by its program the industry were appropriating to itself, and depriving distributors of access to, an important part of the market in which distributors had theretofore participated.

II. CLASSIFICATION OF INDUSTRY PROGRAMS ACCORDING TO POLICY.

Each of the industry programs studied by this Unit falls under one of the three broad policies above described. In order that comparisons might be made between the various industries adopting a particular type of program, and between the types of programs themselves, the following division has been made of the industry programs studied by this Unit.

Group 1 programs (involving manufacturer appropriation of a segregable part of the market) include the following codes:

Salt-Producing
Cement
Wood Cased Lead Pencil Manufacturing

Group 2 programs (involving joint occupancy of the market by direct selling manufacturers and distributors, with some degree of manufacturer control over distributors), include:

Carpet and Rug Manufacturing
Valve and Fittings Manufacturing
Cork
Fire Extinguishing Appliance Manufacturing
Agricultural Insecticide and Fungicide
Business Furniture, Storage Equipment and Filing Supply
Funeral Supply
Asbestos

Group 3 programs (involving an abandonment or relinquishment of a segregable part of the market to distributors), include:

Lumber and Timber Products
Plumbing Fixtures

III. DESCRIPTION OF PROGRAMS BY POLICY GROUPS

Following is a brief description of the programs of each of the industries studied by this Unit, grouped on the basis of the division set forth on the preceding page.

A. Policy Group 1 Programs

1. Salt Producing Industry (*) (Code No. 20)

One-third of the producers by number control nearly two-thirds of the volume. Two producers are much larger than the others, and have been leaders in pricing and merchandising methods. Prior to the code, through association activity, quality and packaging were standardized, and a freight equalization system put into effect, eliminating freight absorption from the field of competitive price cutting. Because of high fixed overhead costs, there is a strong incentive on the part of manufacturers to increase volume through reduced prices, in order to reduce unit cost. Since a general reduction in price levels would not materially increase the total consumption of salt, an increase in the sales volume of one producer would result in a decrease in the volume of other competitive producers, who must meet price competition to retain their market. As long as there is active price competition between manufacturers, there is a tendency toward complete price demoralization. Prior to the code, the industry had succeeded in securing and maintaining almost complete uniformity in published prices between manufacturers, but because of the existence of secret rebates and price concessions, and the existence of price competition between producers and distributors, the industry had not succeeded in controlling price competition as a primary weapon in securing access to the market. Attempts at the control of resale prices of distributors had not proved very successful in the past, and the industry had discontinued granting of trade discounts to jobbers, eliminating the distinction between jobbers and retailers.

Certain of the larger producers maintained branch warehouses, or entered into contracts with wholesale distributors whereby such distributors performed a warehousing and selling function for them, but agreed to adhere to the producer's filed prices and terms of sale.

Prior to the code, there had been a partial segregation and appropriation of the market for direct sales by manufacturers. Retailers capable of buying a carload of salt at a time could secure from the producers as good a price as could wholesalers, and consequently such retailers purchased direct from manufacturers rather than pay wholesalers a higher price. Industrial buyers, capable of buying in carload lots, or whose annual purchases of salt exceeded a fixed number of carloads, could secure as good or a better

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(*) The information contained in the following description of the program of the Salt Producing Industry has been summarized from the Report on the Salt Producing Industry, which is contained in Part I. For a more detailed description of this program, and for details regarding its operation, reference should be made to the Report itself.

price than could salt jobbers, and therefore purchased direct from producers. This appropriation of the market by manufacturers was only partially successful, due to the fact that salt is sold in two different forms -- in bulk, and packaged. As long as manufacturers continued to sell bulk salt to jobbers or wholesalers at a lower price than that charged for packaged salt, such resellers could package the salt and sell in competition with the manufacturers. There is a greater potential profit to manufacturers from the sale of packaged salt than bulk salt, the actual profit on packaged salt depending on the extent of price competition from independent distributors. Manufacturers evidently believed that they could not entirely discontinue the sale of bulk salt, lest they permanently lose the business of large industrial buyers capable of entering into the production of salt for their own use should the price become too high. Yet as long as resellers could secure bulk salt, they could divert it to the packaged salt trade, thus preventing manufacturers from maintaining a large differential in price between bulk and packaged salt.

The code program was evidently designed not only to assist in promoting and maintaining price uniformity and the restriction of price competition between manufacturers through open prices, protection against price competition between the different producing areas, and a prohibition of sales below cost; but an attempt was also made during the code program, with the assistance of the code, to promote direct selling by a further appropriation of the market to direct sellers.

During the code period, the industry discontinued the sale of bulk salt to resellers and to l.c.l. or pooled car consumers. The only persons permitted to buy bulk salt were industrial consumers large enough to buy in straight carload lots, and the only source from which they could purchase bulk salt was the producer or his owned or controlled sales agencies. Thus, salt manufacturers appropriated to themselves the business of all industrial consumers desiring bulk salt who were large enough to buy in carload lots. This was an appropriation on the basis of quantity and commodity.

The manufacturers had discontinued the granting of trade discounts to distributors, and because they granted the same price to all carload buyers of packaged salt, the manufacturers secured the business of all industrial consumers desiring packaged salt, who were capable of buying in carload lots. This was an appropriation on the basis of quantity.

On the higher grades of industrial salt, industrial consumers were given lower prices than were given to independent distributors, if they would enter into annual contracts specifying a minimum total volume of salt to be purchased. This appropriation by the manufacturers was based on class of customer, commodity, and annual volume.

With respect to the unappropriated market for industrial salt --

i.e., l.c.l. buyers of the lower grades of industrial salt and buyers of l.c.l. lots of the higher grades of industrial salt not large enough to purchase the minimum annual volume necessary to qualify as annual contract buyers -- both manufacturers and distributors competed. The volume going to this market was comparatively small and of little importance to the manufacturers. No trade discount was given to distributors and the quantity discounts on the salt going to the unappropriated market were generally so low as to preclude distributors from cutting prices by any significant amount. The primary basis of competition in the unappropriated industrial market became one of service, rather than price. The person (whether manufacturer or distributor) best qualified to fill the needs of these l.c.l. industrial buyers, by maintaining adequate stocks, giving prompt service, or providing storage facilities for the buyers, would be the one most likely to receive the business of these buyers.

With respect to table salt, no attempt was made by the members of the industry to enter the retail market, and this market was left to grocers. However, manufacturers entered the wholesale market on table salt, by discontinuing trade discounts to independent wholesalers, and selling at the same price to all carload buyers of table salt. The quantity discount for carload purchases was so large as toencourage retailers to buy direct from the producer in carload lots wherever possible. This was an appropriation of a segregable part of the wholesale market on the basis of quantity.

With respect to l.c.l. purchases of table salt, manufacturers and wholesalers jointly occupied the market. Attempts were made by individual manufacturers to persuade wholesalers not to resell to retailers at lower prices than were quoted to retailers by manufacturers, but no information is available as to the success of this attempt, or as to the importance to the manufacturer of the l.c.l. retailer trade.

In addition to these activities, the Code Authority endeavored to eliminate the payment of brokerage to cooperative buying organizations. Also, a special discount was granted on table salt to very large retail buyers, under such conditions that only the national chain stores could qualify.

The history of this industry, the statements made by code proponents, and the logical effects of the activities of the industry under the code, lead to the conclusion that the code proponents sought to subordinate price competition as the primary means of gaining access to the market -- first, as between manufacturers, and second as between manufacturers and distributors. As a step in the attainment of this objective, the promotion of direct selling was considered to be necessary. Had the program been completely successful --had price uniformity between manufacturers been achieved, and had manufacturers succeeded in eliminating competition from independent distributors -- it appears evident that the large manufacturers, capable of maintaining efficient, wide-spread distribution

facilities of their own, and, more important, capable of engaging in intensive and expensive advertising campaigns, would have been better equipped to protect and expand their access to the market than the smaller members of the industry, not financially able to effectively compete on the basis of advertising or distributing service to the buyer.

The National Recovery Administration did not play a very active part in the administration of this code. It is doubtful if the NRA realized that the industry intended to prohibit bulk sales to small consumers and resellers, or that the industry program involved the fixation of uniform discounts, prices, and selling terms. No mention was made of these matters at the time of the public hearing on the code, and the NRA never officially endorsed or sanctioned any of the Code Authority or industry activities heretofore mentioned, with the single exception of the Code Authority's attempt to prohibit brokerage payments to cooperative buying organizations. The NRA first interpreted the code as prohibiting payment of brokerage commissions to buyers, then later rescinded this interpretation so far as bona fide and legitimate cooperatives were concerned.

During the first few months of the code period there was an almost complete cessation of bulk sales to resellers and to l.c.l. consumers; published prices remained uniform between manufacturers in each trade area and rebates and secret price concessions were mostly eliminated. There is evidence to the effect that the sales volume of independent salt jobbers and buying cooperatives, particularly wholesale farmers' cooperatives, was greatly reduced. Nothing is definitely known of the effect on the sales volume of the different salt manufacturers.

During the latter half of the code period, there commenced a renewal of rebates, secret pricing, and other forms of concessions to buyers not set forth in filed prices. Responsiblity for the recurrence of this situation is difficult definitely to fix, although the first ones to revert to secret pricing practices appear to have been among the small and middle-sized members of the industry.

Moreover, independent salt jobbers and l.c.l. industrial consumers, who had been denied the opportunity to purchase bulk salt at prices lower than those charged for packaged salt, found means of evading the restriction on sales of bulk salt. L.C.L. consumers ordered full carloads of bulk salt, then turned the carload of salt over to jobbers capable of handling the full carload and supplying the consumers with their salt requirements at a lower cost to them than would have been charged by manufacturers or distributors for l.c.l. packaged salt deliveries. No information is available as to the extent of this practice, but it was sufficiently wide-spread to cause a partial breakdown, at least, in the effective operation of the restriction against bulk sales.

Within a few months after the Schechter decision, deviations from published prices became so great that the price structure of the industry broke down entirely, and the industry is now engaged in a bitter and extensive price war. Some wholesale distributors were again given discounts not based solely on quantity. To the extent that a rebate based on class of buyer may be said to be a trade discount, jobbers are again being given trade discounts.

The contemplated code program of the Salt Industry, as evidenced by the actions of the Code Authority and members of the industry during the code period, included an increase in direct selling by manufacturers, the control of price competition between manufacturers and between manufacturers and distributors and a reduction in the amount of bulk sales, with a resultant increase in the sales of packaged salt. In actual operation the code program appears to have resulted in some increase in direct selling, particularly resulting from the attempted elimination of bulk salt sales to resellers, while continuing bulk salt sales direct by manufacturers to consumers. No definite information is possessed as to the actual extent of increase in direct selling nor the extent to which jobbers were able to evade the restrictions on sales to them. With respect to the attainment of price uniformity and the elimination of price competition between manufacturers and between manufacturers and distributors, the code program appears to have been fairly successful during the first few months of the code period, but there was an increasing breakdown during the latter months, and a complete breakdown of the program following the Schechter decision. With respect to the contemplated decrease in bulk sales and increase inpackaged sales, little is known as to the actual effects, although it appears that the code program was more successful in accomplishment of this end, than it was with respect to the control of price competition.

2. Cement Industry (*) (Code No. 128)

The history of this industry shows a high degree of price uniformity between manufacturers for many years prior to the code, uniform delivered prices having been amintained through the cooperative use of a multiple basing point system. The Cement Industry is one of those industries in which a relatively high ratio of fixed overhead costs to total costs results in strong temptation to the individual producers to increase their volume of production by price reductions, in an endeavor to reduce unit cost and increase total profits. There appears to be a general recognition on the part of manufacturers in this

(*) The information contained in the following description of the program of the Cement Industry has been taken from a summary of the program of the Cement Industry which is contained in the Appendix. For reference as to source of the statements herein made, and for a greater detail regarding the Cement Industry, reference should be made to that document.

industry of the fact that when price competition exists, it becomes the dominant, primary device in maintaining or increasing sales, and price reductions on the part of one individual must be met by reductions by competitors if they are to protect their markets. When price competition exists it tends to become destructive by reason of its tendency to result in prices being based solely on direct costs.

Prior to 1930, the major portion of the industry's output was sold through dealers who were allowed a trade discount. The slump in construction in the late 1920's, with a resultant decrease in consumption of cement, was felt both by producers and dealers. Pressure on manufacturers to sell direct to large buyers requiring no dealer service, became strong and there was an increase in such direct sales by manufacturers. Building supply dealers had had a hold on manufacturers through control over sales for residential building, but the depression shift to public building released this hold and permitted manufacturers to resort to direct selling. Many dealers, in an endeavor to bolster their decreasing sales volume, engaged in the practice of passing on to buyers a part of their discount. There followed a considerable degree of price competition between dealers and direct-selling manufacturers, constituting a serious threat to the price stability of the industry. In 1931 attempt was made by the larger producers to introduce a form of resale price maintenance, by impounding dealer discounts for a period of time, the accrued amount to be paid to dealers only if they had maintained the manufacturer's prices. This attempt was unsuccessful because some of the manufacturers, relying primarily on dealer distribution, and not having to protect direct sales against dealer competition, failed to follow the program.

Thereafter, certain of the larger producers openly allowed specified industrial consumers, capable of handling cement without dealer service, the same discounts as had been granted to dealers. But since many smaller producers continued to allow dealers a greater discount than was granted by them to industrial consumers, the dealers naturally gave their business to these producers. As long as dealers could secure cement at a discount, many of them continued to pass part of this discount on to the consumers.

The code proponents requested and were successful in securing the incorporation in the Cement Code, of provisions to the following effect:

1. The classification of types of customers to whom producers could sell direct, including most of the very large types of buyers.

2. The complete elimination of discounts to dealers, placing them on the same price level as those large users to whom producers could sell direct.

The code provision prohibiting dealer discounts remained in effect only one month and aroused a storm of protests from dealers, as a result of which the provision was stayed by the NRA. The tenor of the protests from dealers was to the effect that this code provision resulted in dealers retaining only the trade of small l.c.l. buyers, while manufacturers sold direct to the important, carload buyers, in whose business the greatest volume of profit lay.

The effect of such a program would have been to appropriate to manufacturers, for direct sales, all of the larger buyers, since they could secure cement from manufacturers more cheaply than from dealers. The market of dealers would be restricted to those buyers, mostly l.c.l. buyers, whom the manufacturers did not care to sell direct, or who required dealer service to a sufficient degree to pay a premium for it. The effect would have been to restrict greatly the volume of cement passing through dealers' hands. The successful operation of this program probably would have been to the advantage of those producers financially able to maintain a large, active and wide-spread sales organization, and to those with factories and warehouses so strategically placed as to be able to render prompt service to buyers. The program probably would have been to the disadvantage of those producers theretofore relying on dealer distribution of their products, unable easily to expand their sales forces and increase the number of their warehouses.

Inasmuch as this provision remained in effect only about a month, it cannot be said that the provision itself had any material effect on distribution practices. Very little definite information has been developed regarding the situation which prevailed during the latter part of the code period, or which now exists. Prices evidently still remain stable in this industry, and manufacturers evidently still continue to sell direct to certain large consumers. Furthermore, there was an offer by the code proponents to amend the code by removing "ready-mixed concrete manufacturers" from the list of buyers to whom manufacturers could sell direct. Although this amendment was never approved by the Administration, the mere fact that it was proposed by the code proponents is some basis for a belief that the proponents were still selling direct to the other classes of large industrial buyers listed in the code, but that there was an inclination on the part of the code proponents to reach a satisfactory adjustment with dealers and with those manufacturers depending primarily on dealers to distribute their product.

This fact, together with the absence of further complaints from dealers to the NRA, and the further fact that the code was amended during the spring of 1935 by the complete elimination of all reference to direct selling or to dealer discounts, gives rise to a question as to whether or not the manufacturers had been able to reach some sort of an adjustment whereby those manufacturers desiring to do so could continue to sell direct to certain types of industrial consumers without dealer competition in that portion of the market.

The Cement Industry program has been placed in Group 1, even though it embodies the reservation of a part of the market to dealers -- that is, the l.c.l. market. The direction in which the industry is moving is toward direct selling, since manufacturers have appropriated a part of the market heretofore controlled by dealers, and have not relinquished to dealers any part of the market heretofore controlled by manufacturers.

3. Wood Cased Lead Pencil Manufacturing Industry (*) Code No. 291)

This industry, which has only thirteen members, has been dominated for many years by four manufacturers, each of whom have controlled over 15% of the business. These four manufacturers have relied for their greatest profit on a five-cent pencil, usually yellow in color, for which they have built up a wide-spread consumer acceptance and demand through extensive advertising. Their other lines range from the penny pencil and two or three for five cent pencils up to the ten cent grade. For the lower priced items they have established a continuing market in educational institutions, to the larger of which they have sold direct, and in all lines they have sold direct to large consumers.

Within the last few years, the so-called "Big Four" manufacturers have had to face the competition of a new group of comparatively small manufacturers which gained a foothold in the industry through a policy of producing and selling a pencil at a price considerably lower than that charged by the Big-Four. The product of the new manufacturers was comparable in color and appearance to the five-cent pencil of the Big-Four, and if inferior in quality, was not sufficiently inferior to impair its competition with the Big-Four product. Chain stores and mail order houses were immediately attracted to this pencil, and because of the low distribution cost to these buyers, and the fact that expensive advertising was not involved in the cost of manufacture, the new producers succeeded in gaining an appreciable part of the business of these distributors, who desired a product with price appeal to the buyer.

In addition to the patronage of these large distributors, the smaller members began to increase sales to smaller retail dealers. While these dealers could not expect to compete on the basis of price with mail order houses and chains, yet they were able to buy the pencils of the smaller producers at prices considerably below

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(*) The information contained in the following description of the program of the Wood Cased Lead Pencil Manufacturing Industry has been summarized from the Report on that Industry, which is contained in Part II and the Appendix. For a more detailed description of this program, and for details regarding its operation, reference should be made to the Report itself.

the cost to them of the well-advertised "Big Four" pencils. By reselling these cheaper pencils to consumers as five-cent pencils, the dealers were able to make a larger margin of profit than was possible on the "Big Four" products. This sutstitution evidently was entirely feasible, largely because of the comparable appearance of the two kinds of pencil, and the fact that the average consumer could discern little or no difference in quality.

The smaller manufacturers evidently depended more on dealer sales activity than on national advertising to increase the market for their product, and this approach to the market was based on the ability of the smaller manufacturers to offer dealers a lower price for their product than could be profitably met by the Big Four.

During the past few years, the new members of the industry increased their volume rapidly, and at the time of the presentation of the code, they were producing about 10% of the total dollar volume of the industry. Even more serious to the older, larger members of the industry than the actual loss of volume to the new members was the fact that they were required to reduce their prices to less profitable levels in order to curb the continued growth of the new members.

The Lead Pencil Institute, dominated by the Big Four, proposed the Code of Fair Competition for the Wood Cased Lead Pencil Industry. The proposed code was an exceedingly complex and comprehensive instrument, containing proposals for fixed minimum prices, allocation of production, resale price maintenance, and over forty other provisions, the apparent effect of which would have been to eliminate the competitive advantages possessed by the new members of the industry, to raise price levels, and to restore the older, larger members to complete control over the industry. Many of these provisions were rejected by the NRA, and many more were either suspended in the order of approving the code, or were stayed subsequently.

The part of the program of particular interest to this study included:

1. Customer Classification. The distinction between wholesalers and retailers was eliminated, and both were classed as "dealers". The code contained a classification of consumers based on quantity.

2. Division of manufacturers into three classes according to volume of production.

3. Authorization for the fixation of minimum prices and discounts. A fixed maximum discount to dealers was proposed, along with minimum volume of purchases which must be made by dealers to qualify for the discount. These minima on volume varied by class of manufacturer. For example, a small manufacturer

could grant a 40% discount only to dealers making annual purchases of one hundred dollars; while large manufacturers could grant a 40% discount only to dealers making annual purchases of two hundred dollars. A sliding scale of discounts to dealers was established depending on volume of purchases. The same arrangement was made for consumers, prices to whom were slightly higher than those granted to dealers on the same quantities, but not sufficiently higher to permit dealers to compete with manufacturers on sales to large consumers.

4. Authorization of resale price maintenance contracts with dealers, and provision that lower discounts must be given to dealers refusing to sign such contracts.

5. Restriction on the opening of new accounts with dealers whose volume of purchases was below a fixed amount.

6. Provision of a lower discount to buyers making purchases in smaller amounts than fifteen dollars for single shipments.

7. Restriction of freight absorption to shipments of 100 pounds and over, except in New York City.

8. Limitation of sales of blank pencils to be imprinted for advertising purposes to "distributors" approved by the Code Authority.

Of these provisions, numbers 3, 4, 5 and 8 were suspended in the order approving the code, and were never officially put into effect. The Code Authority published a list of minimum prices and a scale of discounts, and evidently attempted to operate under such schedule, but the NRA officially disapproved the schedule in June, 1934, and it does not appear that the Code Authority activity was very effective.

The smaller code opponent members of the industry contended that each of the above provisions, with the exception of the elimination of the distinction between wholesalers and retailers, would handicap them in their access to the market. They stated that they depended to a considerable extent on sales to small dealers, and hoped to expand their sales to that class of trade, and complained that the minimum annual volume requirements proposed were so large as to prevent them from granting adequate discounts to dealers, from opening new accounts with small dealers, and from continuing to sell to dealers so small as to be unable to order fifteen dollars worth of merchandise at a time. Furthermore, since a large part of their business was with very small dealers, the prohibition against freight absorption except on shipments of over one hundred pounds would be

a further handicap to them, by further raising the price to a large number of their outlets.

However, there is no evidence to indicate that any of the few effective code provisions operated in the manner feared by the small producers. In fact, the code proponents, in the fall of 1934, requested the administration to stay several provisions of the code, including the open price provision, alleging that the program originally proposed was one single pattern, the operation of each part of which depended on the operation of every other part, and that the Administration's action in disapproving or staying the minimum price fixing provisions made it impossible to effectively administer the remaining provisions. It seems clear that the Wood Cased Lead Pencil Code was entirely ineffective in accomplishing the aims of its sponsors, and it is doubtful if it had any appreciable effect on distribution, volume, or prices.

This industry is placed in Group No. 1 for the reason that the code program resulted in the discontinuance of trade discounts to wholesalers, placing them in the same discount class as retailers. There was an appropriation of a part of the wholesale market by manufacturers, the appropriation being based on quantity. That is, manufacturers would sell at the same price to retailers and wholesalers having the same annual volume. Wholesalers were permitted to compete for the business of retailers so small as to qualify for a low volume discount, but even on this part of the market an attempt was made to require the wholesalers to observe the prices of manufacturers.

There was an appropriation of a large part of the consumer market through the fact that large consumers were given prices lower than were given to any save the largest dealers which prevented effective competition from dealers on such business.

B. Policy Group 2 Programs

1. Cork Industry (*) (Code No. 199)

This is a small industry in which one-third of the producers by number control more than three-fourths of the total volume of production. One member alone controls over fifty percent of the total production. The larger concerns over a period of several years have been increasingly using sales branches and exclusive distributors. The smaller units have depended to a greater extent upon independent wholesalers and jobbers, as they are either financially unable or unwilling to afford the expense of branch factories, sales offices, and warehouses. There is a high degree of uniformity in cost of products and in list prices quoted by manufacturers. The only factors which have blocked complete price uniformity have been the ability and the desire of independent distributors to reduce prices, and the possibility of price concessions through freight absorption. Despite their fear of reprisals from the powerful price leaders the smaller manufacturers have undoubtedly attempted to retain their independent distributors by giving them a margin applicable to price cutting.

The proposed code program required: Price filing; classification of distributors in three main groups (factory branches, exclusive distributors and independent distributors); and conformance to manufacturers' filed prices by distributors as well as by manufacturers.

The opposition to these provisions came from smaller manufacturers who objected to code control of their relations with distributors. Published list prices had been uniform in the past. The filing of discounts according to mandatory customer classes would bring all prices and discounts into the open and expose any price cutting operations of smaller manufacturers of their distributors to the superior power of the dominant industry group. Not only would consumer prices be revealed in this case, but publicity would also be given to any special inducements to distributors by way of larger discounts to secure their necessary cooperation. The smaller manufacturers felt that such publication would result in uniformity of prices and discounts. More than this, a statement made by one of the code proponents clearly indicates that it was the intention to grant lower discounts to independent distributors than to manufacturer-owned or controlled distributors. Consequently they objected, stating that it was vital to their livelihood that they be left free to make such arrangements with their distributors as were necessary to secure the distributors' cooperation.

The approved code first included distributors within the definition of the industry, but the code was later amended and direct control of distributors was eliminated. The Code authorized the presentation by the Code Authority to the NRA of merchandising plans for each of the five divisions of the industry, involving resale price maintenance. The first division of the industry to gain consideration of a merchandising plan was the Cork Insulation Division. The NRA deleted the mandatory

(*) The information contained in the following description of the program of the Cork Industry has been summarized from the Report on the Cork Industry, which is contained in Part II. For a more complete description, reference should be made to the Report itself.

resale price maintenance feature of this plan and substituted therefor a requirement that distributors must file their prices with the manufacturers' code authority, this requirement to remain in effect only if 75% by number and 85% by volume of the distributors assented to this requirement. Several months elapsed between the presentation of the merchandising plan and its final approval. Shortly after the presentation of the plan, the larger producers put into effect a selling system whereby their distributors were required to maintain the resale prices established by manufacturers, but some of the recalcitrant smaller producers refused to do this until forced by the code to do so. Because of the long delay of the NRA in acting upon the proposed merchandising plan and the failure to specifically require resale price maintenance, the cork insulation division of the industry, as far as merchandising methods were concerned, reverted to the position in which it was immediately prior to the code.

Although the other four divisions of the industry presented merchandising plans, only one (which did not have any features of particular importance to this industry) was approved. The program for the Cork Insulation Division was typical of the desires of the code proponents.

Had the contemplated program operated successfully, it seems possible that price competition would have been eliminated almost entirely, in view of the past history of uniformity of list prices between manufacturers. In such a case, it is doubtful if the small manufacturers would have been able to maintain the special inducements to their distributors necessary to offset the advantages of the direct selling organizations of the larger manufacturers. The program therefore was double-edged in that it handicapped both smaller manufacturers and independent distributors. The restriction of price competition and the handicapping of independent distributors would have been to the benefit of those manufacturers maintaining exclusive sales forces, numerous factory branches and warehouses, with well known brand names constantly brought to the attention of the consuming public through nationwide advertising; and would have been to the disadvantage of those manufacturers not financially equipped to effectively compete in advertising, who would have been forced to completely revise their method of selling.

2. Carpet and Rug Manufacturing Industry (*) (Code No. 202)

Prior to the code, manufacturers sold direct to retailers, and indirectly through wholesalers. Some producers sold entirely direct to retailers, others entirely through wholesalers, and other utilized both channels. 1/2/ Trade discounts were given to wholesalers and to certain specified large retailer buyers. Discounts based on quantity purchased in the previous season were granted to all buyers, wholesale and retail. 3/4/ The history of the industry is one of uniformity between price lists, with a small differential in price to smaller members of the industry, permitting them to give a greater volume discount to buyers in any quantity bracket than would be given on that quantity by a large manufacturer. 4/

A considerable number of trade practice provisions were contained in the proposed and approved codes for this industry; however, of such provisions only those of central importance in this analysis are discussed herein.

The code proponents requested a code provision prohibiting manufacturers from selling to wholesalers who failed to maintain the manufacturers' prices and schedule of discounts. 5/ The approved code contained a provision stating that it "shall be an unfair trade practice for any member of the industry to distribute through intermediate channels in such a manner as shall create unfair competition, as defined in Articles VII, VIII, and IX, with members of the industry distributing direct to the retailer and consumer." 6/ This rather ambiguous provision was interpreted by the Code Authority to require wholesalers to resell at the same price as would be charged by the manufacturer to the consumer or wholesaler. 7/

The industry also attempted to discontinue the granting of volume discounts to cooperative buying syndicates of independent retailers (while continuing such discounts to retail chains), through a provision to the effect that the calculation of volume discounts must be based "only on merchandise involved to an individual company." 8/ This provision was stayed by the President in the order approving the code. It was subsequently made effective upon agreement of the code authority to interpret "individual company" to include cooperative buying syndicates. 9/ Later the code authority abandoned its agreement, 10/ buying syndicates then securing an official interpretation of their favor. 11/ Thereupon the code authority requested that the program again be stayed, which was done. 12/ Although some manufacturers continued to refuse to give volume discounts to buying syndicates, the fact that the number of such syndicates increased during the code period is evidence to the effect thhat the code attempt to eliminate volume discounts to buying syndicates was generally unsuccessful. 13/

(*) The information contained in the following description of the program of the Carpet and Rug Industry has been prepared from work materials contained in the files of this Unit. The employment of the investigator assigned to the study of this industry ended before his report was placed in shape which would permit its inclusion in the Appendix to this Report.

Footnotes appear on page 35

The code prohibited sales by producers direct to consumers, except in the case of government and certain common carriers. 14/ When one producer complained that this provision of the code would put him out of business, because it was his custom to sell direct to consumers, an exemption was promptly granted. The Code Authority explained that it did not know that any producers followed this method of distribution. 15/ No other instances of this nature occured, and it does not appear that the provision had any effect on selling methods.

In view of the different channels of distribution in use in this industry, 1/2/ the original request for resale prices maintenance 5/ and the interpretation of the Code Authority to the effect that the code required resale price maintenance on the part of wholesalers 7/ was evidently designed to protect those manufacturers desiring to sell direct to retailers against price cutting by distributors -- either their own or those of other manufacturers. Moreover, by removing the pressure on direct sellers to meet the price cuts of distributors, application of this interpretation would assist in the maintenance of the stabilized price structure of the industry.

Although the intention underlying the attempt at the discontinuance of volume discounts to buying syndicates is not so obvious, the possibilities inherent in such an endeavor should be pointed out. First, the growth of combinations of retailers, each claiming high volume discounts on the basis of their total, pooled purchases, 13/ tends to lower the price level of the industry by placing more and more retailers in the higher discount brackets instead of the lower brackets for which their individual purchases would qualify them. It is natural that all producers of carpets and rugs would be opposed to this trend. Second, the combination of retailers into groups to enable them to buy from manufacturers at lower prices than they could otherwise secure, would remove from the market available to wholesalers increasing numbers of retailers. This effect would be to the disadvantage of wholesalers and those manufacturers selling primarily through wholesalers and depending on their continued existence. 13/

One outstanding difference between this industry's program and that of the other industries studied by this Unit should be noted. There was no attempt by this industry to secure absolute uniformity of prices between all members of the industry, 16/ Smaller members (who depended more on wholesalers than did the larger members, and who were incapable of entering into extensive advertising campaigns) were granted a small differential in price under that of the larger manufacturers. 4/ Evidently the code proponents did not desire to entirely eliminate price competition, but wished to limit it, permitting the smaller members to have some price advantage to balance the advertising and brand name advantage possessed by the larger members. The statement was made by one of the code proponents that this program was consciously designed to strike a balance of competition between the various manufacturers, and that there was no desire to give one class of manufacturers a competitive advantage over others. 4/

Although the industry apparently was not successful in eliminating the granting of volume discounts to buying syndicates, the information in NRA files indicates a considerable degree of success in limiting price competition between manufacturers and distributors. 17/ 18/

Footnotes:

1/ See "Distribution of Textiles", Bulletin No. 56, Harvard University Bureau of Business Research.

2/ See information furnished by the Institute of Carpet Manufacturers of America - (Volume A - Code Record Section Files).

3/ See statement of P. J. Lundgren, Cavendish Trading Corporation (Transcript of Hearing held October 4, 1933.)

4/ See statement of H. I. Gutterson, Chairman of the Code Authority (Transcript of Conference held April 8, 1935.)

5/ See original code proposal - (Volume A - Code Record Section Files.)

6/ See Article VII, Section 1 of Code.

7/ See Code Authority Bulletin No. 7, dated March 16, 1934.

8/ See Article VII, Section 19 of Code.

9/ Interpretation Code Authority Stabilization Committee (Code Authority Bulletin No. 12, May 17, 1934.)

10/ See Minutes, Code Authority Stabilization Committee, held February 20, 1935.

11/ See Administrative Order 202-16, dated March 23, 1935.

12/ See Administrative Order 202-17, dated March 30, 1935.

13/ See statement of H. I. Gutterson, Chairman of the Code Authority (Transcript of Hearing held April 25, 1934.)

14/ See Article VII, Section 16 of Code.

15/ See Administrative Order 202-7, dated May 17, 1934.

16/ See proposed code (Volume A - Code Record Section Files), and the approved code.

17/ See testimony and exhibits given by Irving C. Fox, Counsel, National Retail Dry Goods Association - (Transcript of Hearing held April 17, 1935.)

18/ See Letter from Administration Member transmitting Minutes of the Code Authority Meeting held April 4, 1934 - (Deputy's files - "Administration Members" folder.)

3. Funeral Supply Industry (*) (Code No. 90).

Certain members of the industry sold direct to retailers - funeral directors - through their own selling organization; others sold primarily through independent jobbers; and still others sold both direct and through jobbers. Even those members specializing in direct sales utilized jobbers to some extent, particularly for sales in areas where they did not maintain selling agencies. (**)

Jobbers were given a trade discount. (***) In recent years there has been a growth of buying organizations of retailers - cooperatives, retailer-owned jobbers - which demanded the jobber discount. The granting of jobbers' discounts to these organizations was considered by the code proponents to be detrimental to the interests of those manufacturers selling direct to retailers and to the price structure of the industry as a whole. Independent jobbers and funeral directors also were opposed to the granting of jobber prices to retailer-controlled buying organizations.(****)

The operations of another type of distributor were disturbing to the code proponents, jobbers, and funeral directors. Cemetary and burial associations - composed of or supported by consumers - were engaged in

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(*) The information contained in the following description of the program of the Funeral Supply Industry has been prepared from work materials contained in the files of this Unit. The employment of the investigator assigned to the study of this industry ended before his report was placed in shape which would permit its inclusion in the Appendix to this Report.

(**) Letter from Code Authority, dated Nov.21, 1934 - (See Consumer Advisory Board Files, Folder A).

Transcript of Public Hearing, held Dec. 7, 1934, p. 32

(***) See Article IX, Sec. 1 (h) of Code.

(****) Letter from Code Authority, dated Nov. 24, 1934 - (See Consumer Advisory Board Files, Folder A).

Minutes, Code Authority Exec. Comm., 11/13/33 - (Deputy's Folder 18-c).

the business of selling funeral supplies as such direct to consumers. This was a sharp contrast to the customary method of retailing funeral supplies. Funeral directors always combined their retailing function with a service function. That is, the price to the consumer combined a charge for the undertaking function as well as a charge for funeral supplies. The cemetary and burial associations sold funeral supplies to consumers separate from the undertaking function, which was performed separately from the retailing function. Because of the volume controlled by burial associations and cemetery associations, they claimed a lower price than was granted to independent funeral directors, thus making it possible for them to resell to consumers at lower prices than could be profitably met by funeral directors. (*)

The proposed code program included an attempt at the discontinuance of sales of funeral supplies to burial and cemetery associations; (**) the prohibition of jobbers' discounts to retailer-controlled buying organizations; (***) and resale price maintenance on the part of jobbers. (****)

The approved code prohibited sales of funeral supplies to burial and cemetery associations or others not legitimately engaged in funeral directing. (*****) Jobbers were defined as wholesale distributors carrying stocks of goods and shipping out of such stocks at least half of the goods sold by them (******) Jobbers' discounts were restricted by the code to distributors qualifying as jobbers under this definition. (*******)

(*) See Transcript of Hearing, Dec. 6, 1933, pp. 29,54 and 61

(**) See Article VIII, Sec. 1 (a) of Code.

(***) See Article IX, Sec. 1 (h) of Code.

Minutes, Code Authority Exec. Comm., 11/13/33 - (Deputy's Folder 18-c.

(****) See Article IX, Sec. 1 (i) of Code.
See Transcript of Hearing, Sept. 19, 1933, p. 85.
See Report, Consumers Advisory Board, Dated Nov. 1, 1933 - (Consumer Advisory Board Files, Folder A).

(*****) See Article VIII, Sec. 1 (a) of Code.

(******) See Article II, Sec. (d) of Code.

(*******) See Article IX, Sec. 1 (h) of Code.

The evident intent of this provision was to prevent buying organizations of retailers from receiving a jobber's discount if their principal business was the mere transmission of orders from retailers to be filled by direct shipments from manufacturers. In other words, jobbers were required to perform a warehousing function. (*)

The code contained a provision prohibiting the extension to any customer, either retailer or jobber, of discounts or terms differing in any material way from the manufacturer's published discounts or terms.(**) Since jobbers were included as members of the industry by the code definition, and were required to adhere to the requirements of the code, (***) this provision required them to adhere in their resales to the discounts and terms published by manufacturers. (****)

In operation, the code did not accomplish the desires of the proponents, either with respect to retail buying organizations or burial and cemetery associations. There does not appear to have been any concerted opposition on the part of any members of the industry, but evidently a considerable number of manufacturers were willing to continue to sell to buying organizations and cemetery and burial associations until they were compelled to desist. The program was not successful in providing this compulsion. (*****)

The restriction of jobbers' discounts to distributors performing a warehousing function was not successful in stopping the granting of jobbers' discounts to buying organizations, a considerable number of which, at least, found it possible to meet this qualification. The code requirement of resale price maintenance on the part of jobbers did not solve the problem of the buying organizations, since they need not reduce resale prices, but could give to their members dividends based on profits, thus reaching the same end. The Code Authority attempted to interpret the code definition of a jobber to mean that no agency or organization owned, controlled, or affiliated with retailers could qualify as a jobber. The NRA disapproved this interpretation. (******) The Code Authority then proposed to amend the code definition of jobber to attain this result, but the amendment was not approved by the NRA.(*******)

What evidence we have regarding the operation of the provision

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(*) See Minutes, Preliminary Meeting of Code Authority, held October 24, 1933 - (Volume B-2).

(**) See Article IX, Sec. 1 (i) of Code.

(***) See Article II, Sec. (b) of Code.

(****) See Report, Consumers' Advisory Board, dated Nov. 1933 - (Consumers' Advisory Board Files, Folder A).

(*****) See Minutes, Code Authority Meeting held April 9, 1934 - (Deputy's Folder 18-d).

(******) Letter, Review Division to Code Authority, dated March 26, 1935 - (Deputy's Folder 16).

(*******) Letter from Code Authority, dated Nov. 24, 1934 - (See Consumer Advisory Board Files, Folder A).

prohibiting sales to burial and cemetery associations and others "not legitimately engaged in funeral directing" indicates that this provision did not accomplish the aims of the code proponents, as the Code Authority requested the amendment of the code by deleting this provision and suggesting a provision prohibiting sales by manufacturers or jobbers to any buy licensed funeral directors. This amendment was proposed late in the code period and was not approved, but indicates that the original code provision did not operate satisfactorily, possibly because of the difficulty of determining the meaning of the term "legitimately engaged in funeral directing." (*)

Had the code program operated successfully, it is apparent that the manufacturers selling direct to funeral directors would have been protected by the elimination of price competition with jobbers through resale price maintenance. Since jobbers were protected by a differential, manufacturers depending on jobbers would not have had their access to the market impaired by reason of the resale price maintenance in and of itself. Of course, if any manufacturers had depended on sales to cemetery or burial associations, or to retailer-owned or controlled buying organizations, for an important portion of their volume, those manufacturers would have been injured by any action effectively eliminating or reducing sales to those distributors. No information on this point has been developed.

The code program was unsuccessful in accomplishing the aims of the proponents and its failure can be attributed to the fact that the NRA refused to give the compulsion which was necessary to overcome the lack of cooperation from the industry members.

(*) See Transcript of Hearing, Dec. 7, 1934, p. 21.

4. Agricultural Insecticide and Fungicide Industry* (Code No. 275a).

This is a small industry composed of a few very large chemical companies (producing insecticide and fungicide only as a side line) and other companies specializing in insecticide and fungicide. The principal user is the farmer. The methods of distribution before the code were: direct sales to farmers, sales to farmers' cooperatives, sales to retail dealers, and sales to jobbers. Most producers used all methods, but depended more on certain channels than on others. Some use was made of manufacturers' sales agents-- exclusive territorial agents who took the place of the manufacturers' sales forces in certain areas. The large chemical companies relied to a greater extent on manufacturers' sales agents and jobbers than did the companies engaged solely in this industry. Particularly those producing a full line of insecticide and fungicide relied more on their own sales forces to contact retailers, cooperatives and consumers (thus enabling them to conduct an educational campaign for the most effective use of the wide number of different products manufactured in this industry), than did certain other concerns which produced only a comparatively few of the better known and standardized products. These relied more on jobbers than on their own sales forces. Evidently the distribution methods selected depended more on the variety of products and the necessity for consumer education in the use thereof, than on the size of the producer.**

At the time of the presentation of the code, the industry was engaged in a demoralizing price war, and it was claimed that every member of the industry was selling certain products below his cost. The stopping of this price war was the primary purpose of the code proponents, and to attain this end they requested the establishment of minimum cost levels below which sales could not be made. The NRA acceded to the request of the code proponents and approved a schedule of minimum prices on two of the largest volume products of the industry. These minimum prices were not put into effect until late in 1934 and expired in April 1935.***

(*) The information contained in the following description of the program of the Agricultural Insecticide and Fungicide Industry has been prepared from work materials contained in the files of this Unit. (See work data files) The employment of the investigator assigned to the study of this industry ended before his report was placed in a shape which would permit its inclusion in the Appendix to this Report.

(**) Report of Constant Southworth, Minimum Price Unit, dated January 10, 1936, containing information gained by investigation in New York, N. Y.

See Transcript of Hearing, February 7, 1934, pp. 91-95.

(***) See reference to Southworth Report, supra.

To effectuate the minimum prices, certain provisions affecting distribution were included in the code. These provisions included:

(1) Customer classification. The code contained definitions of dealers,* jobbers,* consumers,* unincorporated consumer cooperatives,* brokers,* and "agricultural sulphur distributors.* The Code Authority was given control over the classification of sulphur distributors and jobbers,(**) which enabled the Code Authority to prevent a classification as distributors or as jobbers of individuals or concerns which the Code Authority did not believe should receive treatment as distributors or jobbers. No specific mention was made of incorporated farmers' cooperatives or manufacturers' sales agents on products other than sulphur.

(2) Open prices. An open price system was included in the code under which each member was required to file prices, showing the differentials granted to jobbers and dealers and the commissions granted to brokers, and all other terms and conditions of sales.(***)

(3) Resale Price Maintenance. Manufacturers were required by a code provision to enter into resale price maintenance contracts with their jobbers. The operation of this provision was restricted a six months' period of time from May 10, 1934, the effective date of the code.(****)

This provision, in part, was extended to June 16, 1935.(*****)

(4) Price differentials. The code did not specifically authorize the fixation of differentials between the various classes of customers. In November 1934, the NRA fixed minimum prices on two important industry products. No mention was made of differentials in price to different classes of customers, and the minimum prices were considered by the industry to be the lowest prices which could be granted to the most preferred class - i.e., jobbers. In practice all members of the industry adhered to a graduated scale of prices, whereby the dealer was charged more than the jobber, and the consumer more than the dealer. The differentials granted to each class

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(*) See Article II, Sections (f), (e), (g), (h) and (d) of the Code.

(**) See Article V, Section 1 (1) of the Code.

(***) See reference to Southworth Report, supra.

(****) See Article V, Section 2 of the Code.

(*****) See Administrative Order 275-A-16, dated Nov. 11, 1934.

of buyers became uniform throughout the industry, and this uniformity exists up to the present time.(*)

The Code Authority was active in supervising and regulating the classification of jobbers. "Incorporated profit-operating farmers' cooperatives" were classified either as jobbers, dealers, or consumers, depending on their method of doing business and the function performed for the producer, and on their volume of purchases.(**)

The primary objective of the code proponents seems to have been the elimination of price competition between manufacturers on the principal products of this industry. To achieve and maintain this objective, it was necessary to eliminate price competition between jobbers and direct-selling manufacturers. Distributors were protected by price differentials, and direct-selling manufacturers were protected by resale price maintenance contracts with jobbers--the only distributors in a position to effectively compete with manufacturers on the basis of price.(***)

Although minimum prices were established by the NRA for only a comparatively brief period of time, the members of the industry continued to adhere to the minimum prices and to uniform differentials between various classes of customers, following the expiration date of the NRA. This condition exists up to the present time.(****)

There does not appear to have been any desire on the part of the code proponents to handicap any manufacturer in his method of distribution, and no evidence to the effect that the code required or caused any appreciable change in the channels through which the products of this industry passed. Combined with the minimum price provision, the code program had the effect of protecting manufacturers against price competition among themselves on certain large selling items, and protecting that result by eliminating price competition between manufacturers and distributors.(*****)

(*) See reference to Southworth report, supra.

(**) See reference to Southworth report, supra.

(***) See reference to Southworth report, supra.

(****) See reference to Southworth report, supra.

(*****) See reference to Southworth report, supra.

5. Valve and Fittings Manufacturing Industry(*)
(Code No. 143)

This industry includes concerns engaged in the manufacture of various types of valves, pipe fittings and accessories, which products are used in assembled units of equipment manufactured by concerns not members of this industry. There are several divisions of the industry, each manufacturing a different type of product. Comparatively few manufacturers are engaged in all divisions of the industry. These few are known as "full-line producers", while manufacturers making only a limited number or type of product are known as "short line producers". The full-line producers are generally larger in size and total volume than are the short line producers.

Some members of this industry sell solely through distributors, except when selling direct to very large consumers (usually to the Government). Others never sell through distributors, performing their own distribution through factory warehouses or branch warehouses. Still others use both methods of distribution.

The proposed code program involved:

1. Classification of customers into six groups - distributors, pipe fabricators, pipe contractors, general contractors, original equipment manufacturers, and consumers.

2. The fixation of differentials in price between the various types of buyers with the distributor given the lowest price.

3. Resale price maintenance through a provision requiring producers to exercise due diligence in maintaining resale prices.

4. The inclusion under the provisions of the code of factory warehouses or branch offices of members of the industry.

5. A requirement that sales must be f.o.b. point of shipment, and the establishment of a minimum size of shipment on which freight allowance might be made.

(*) The information contained in the following description of the program of the Valve and Fittings Manufacturing Industry has been summarized from the report on the Valve and Fittings Manufacturing Industry contained in the Appendix. For a more complete description of this program, and for details regarding its operation, reference should be made to the report itself.

Of the above provisions, only the first, the definition of classifications of customers, was included in the approved code. Short line manufacturers opposed the establishment of fixed differentials, contending that such action would result in price uniformity, and that short line producers must be given a differential under the prices of full line producers in order to continue in business. The statement was made that jobbers preferred to handle a full line produced by one manufacturer, instead of assembling a full line by purchases from several short line producers, and that such short line producers must make a more attractive price than the full line producers in order to induce jobbers to buy from them.

The short line producers also objected to the resale price maintenance provision, contending that such a provision gave undue advantage to producers able to sell direct through their own warehouses, while short line producers depending on independent distributors would have imposed upon them barriers against price reduction which would not apply to the branch houses of the direct selling manufacturers.

The direct selling manufacturers did not wish to have their warehouses controlled by the price provisions of the code unless independent distributors were controlled.

Those members of the industry who did not maintain factory warehouses but depended on independent distributors, objected to the requirement that sales must be made f.o.b. point of shipment, contending that this would give an unfair advantage to concerns possessing factory warehouses, permitting them to absorb freight from the factory to the warehouses and to charge the buyer for the freight charge from the warehouse to the point of destination only. Concerns not having warehouses would be required to ship f.o.b. factory which, in very many instances, would require a greater freight charge to buyers. The approved code authorized the Code Authority to conduct a market study to consider the functions and services performed by the various types of buyers and the difference in cost thereof, in order that a basis might be shown for the establishment of fixed differentials in price between buyers. Although committees were used to make this market study, no plan satisfactory to all members of the committees was evolved until late in the Spring of 1935, and no report or recommendation was made to the Administration on the question of fixed differentials between classes of customers. The approved code required the filing of prices to each of the classes of trade therein defined and required that the "lowest prices that may be filed shall be the prices at which he (the producer) shall sell his products to his distributors."

This last provision, which was the only approved code provision exercising any direct effect on distribution or distribution channels, came into conflict with Executive Orders 6646, 6767, and Administrative Order X-48 (permitting prices to be quoted to Government agencies 15%

under filed list prices). The Code Authority apparently believed that if a producer was to adhere both to the code and to these Executive Orders, producers reducing their prices to the Government below filed prices would be required also to reduce their prices to distributors below actual filed price, in order that no buyer could receive a better price than distributors. Since this would have resulted in a violation of that provision of the code requiring members to adhere to their filed prices, a hopeless conflict resulted which was not straightened out before the end of the code period.

As a result, it does not appear that the Valve and Fittings Manufacturing Code had any appreciable affect on distribution or distribution channels.

A discussion of what might have happened had the original program of the industry been approved by the NRA may be somewhat academic, in view of the fact that the program did not receive approval. The short-line producers believed that the program would have resulted in price uniformity, and that the full line producers were far better equipped to sell on the basis of brand, selling effort, and product, than were the short line producers. Their belief was evidently strong enough to defeat any chance of successful operation of the program without compulsion by the NRA.

6. Fire Extinguishing Appliance Manufacturing Industry (*) (Code No. 98).

This is a small industry in which seventeen members control over three-fourths of the total dollar volume of production. These seventeen members composed the Code Authority, and were the code proponents. Some producers maintain branch sales offices and warehouses, while others utilize independent distributors. Certain members used both methods of distribution.

The code program shows a desire on the part of the proponents to eliminate price competition both between manufacturers and between manufacturers and distributors, by the establishment of minimum list prices and the fixation of the uniform discounts therefrom, and by requiring adherence thereto by manufacturers and distributors.

(a) Customer Classification. Under an authorization contained in the code, the Code Authority defined various classes of buyers, including "distributors", jobbers, U. S. Government, very large users, dealers and consumers. The Code Authority definitions were informally approved by the assistant deputy administrator in charge of the code early in 1934.

(b) Trade Differentials. Under authorization contained in the code, the Code Authority established fixed discounts to each class of trade. List prices were prices to consumers, the various kinds of resellers receiving discounts therefrom. A distinction was drawn between Class A manufacturers, having national sales forces, and Class B manufacturers, not maintaining extensive sales forces and depending primarily on jobbers, the latter class of manufacturers being permitted to grant slightly larger discounts to jobbers than the former could give.

(c) Resale Price Maintenance. The Code prohibited the practice of "continuing to supply any trade factor whose practices are fully proved to be destructive of the market at prices which enable him to continue destructive marketing." The Code Authority interpreted this provision as requiring resale price maintenance on the part of resellers, and formulated a "distributor contract form" which must be entered into between manufacturers and their distributors, requiring the distributor's adherence to the manufacturers' filed prices, among other things. The NRA later ruled that this provision did not, per se, require resale price maintenance.

(*) The information contained in the following description of the program of the Fire Extinguishing Appliance Manufacturing Industry has been taken from the summary statement of the code program affecting distribution of the Fire Extinguishing Appliance Manufacturing Industry, contained in the Appendix.

(d) Filed Prices. Each manufacturer was required to file his prices and discounts and terms of sale, plus a list of his distributors.

(e) Minimum Prices. The Code authorized the Code Authority to establish a "lowest representative cost" for the various industry products, based on the cost of representative members of the industry. The Code Authority fixed minimum list prices, which were informally approved by the assistant deputy administrator.

Prices to consumers were to be uniform, the only deviation from complete price uniformity resulting from a concession made to Class B manufacturers, whereby they could allow a slightly greater discount to jobbers than could be given to jobbers by Class A manufacturers. The attainment of consumer price uniformity would be most advantageous to those members of the industry capable of engaging in extensive advertising campaigns, and having well known brand names for which consumer acceptance and demand had been built up.

The differentials which were fixed by the Code Authority established a very narrow margin on which jobbers could operate in competition with direct selling manufacturers in sales to the government and large industrial buyers. The government and large industrial buyers were given a discount of 50/10%, which was the same discount fixed for the jobbers of Class A manufacturers. Class B manufacturers (not maintaining a national sales force, and depending on jobbers to distribute their products), could allow jobbers a discount of 50/10/5%, which meant that the jobbers of the indirect selling manufacturers were granted a discount of 2½%, greater than was given to the government and large industrial buyers, or a mark-up margin of 4½% on which to operate on sales to these classes of buyers. This mark-up margin, though small, was evidently considered by the Code proponents to be sufficient to permit indirect selling manufacturers, through jobbers, to participate in sales to the government and very large users.

The Code Authority activity with respect to definition of customers, fixed discounts, and fixed minimum prices, were all formally disapproved by the NRA in June, 1934. This action resulted from protests by buyers and members of the industry who had previously relied on their ability to undersell other producers to gain their access to the market. There was never as much publicity given the formal disapproval of the program as had been given to the preceding informal approvals, and it appears that the Code Authority was loathe to give up the program which had been developed.

In April, 1935, the Federal Trade Commission issued a complaint against the seventeen members and officers of the Code Authority, charging that they had entered into a combination in 1932 to fix and maintain uniform prices, refrain from soliciting customers of each other; refuse to sell to distributors, jobbers and dealers failing to maintain the resale prices set by manufacturers; and to do other things designed to suppress and prevent price competition. The complaint further charged that the respondents, under color of the code of fair competition, continued

to agree on uniform prices by reason of which competition had been suppressed and small enterprises discriminated against. In September, 1935, the respondents filed a consent answer, insisting that everything done by them was done under and pursuant to the code and in good faith, but consenting to the issuance of an order to cease and desist from the methods of competition alleged.

It is apparent that until the consent decree this industry's program, which involved the elimination of price competition between manufacturers and between manufacturers and distributors, operated with a considerable degree of success even after the disapproval by the NRA of the fixed prices and discounts.

7. Business Furniture, Storage Equipment and Filing Supply Industry - Steel Office Furniture Division (*) (Code No. 88).

In this industry there is a conflict in methods of distribution between the larger, full-line producers, and the smaller, shortline producers. The former depend more on direct distribution, maintaining their own wholesale and retail branches, and selling through independent distributors only incidentally. Smaller producers, particularly short-line producers, do not maintain such extensive outlets, and rely on independent wholesalers and retailers to distribute the major part of their production. (**)

Those manufacturers selling direct found that their principal price competition came from the distributors of other manufacturers' products. The code proponents contended that conditions in the industry could not be improved as long as independent distributors were enabled to engage in uncontrolled and destructive price cutting. However, it was necessary for the producers who sold through independent distributors to maintain their existence, whether or not it meant

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(*) The information contained in the following description of the program of the Business Furniture Storage Equipment and Filing Supply Industry - Steel Office Furniture Division has been prepared from work materials contained in the files of this Unit. (See work data files) The employment of the investigator assigned to the study of this industry ended before his report was placed in a shape which would permit its inclusion in the Appendix to this Report.

(**) Statement of Joseph Berger, Art Steel Co. of New York (Volume B, pp. 109-110.)

Abstract on Public Hearing, 9/21/23 (Research and Planning Files, p. 44).

the granting of additional price margins as a prelude to price cutting. The prevalence of price cutting by distributors reflected only the necessity for one group in the industry to offset by price reductions its fundamental competitive disadvantage. (*)

The proposed code for the business furniture industry included classification of customers and products, fixed trade differentials and quantity discounts, and prohibited manufacturers from selling to any distributor who failed to abide by the resale prices set by the manufacturers. The Code also required each member to file his prices and discounts to each class of trade. (**)

The Administration disapproved the provisions fixing trade discounts, (***) and the provision relating to resale price maintenance was revised in such a manner as to make its meaning doubtful. (****) The Code Authority interpreted the provision as requiring resale price maintenance; (*****) the Administration finally decided that resale price maintenance was not required by the Code. (******)

The code proponents contemplated a program which directly controlled all factors entering into price except the base price (*******); and the fact that base prices attained a high degree of uniformity following the approval of the code indicates that the proponents may have contemplated this result also. Thus price competition between producers was to be eliminated or greatly curtailed. Application by the Code.

(*) Memo. dated 9/23/33 from Ind. Adv. Board (Deputy's Folder 316).

Letter dated 1/18/35, from Nat. Emergency Committee (Deputy's Folder 20-A)

(**) Volume A, proposal, 9/11/33.

(***) Memo. dated 3/22/35, Baird-Butt to Staten (Consumers Adv. Bd., Folder A.)

(****) See Art. VI, Sec. 2(f) of Code.

(*****) See Memo. dated 2/6/35, Gallagher to Cochrane (Deputy Folder 19); Memo dated Jan. 24, 1935, Advisory Council to N.I.R.B. (Deputy's Folder 20-A); memo dated 3/22/35, Baird-Butt to Staten (Consumers Advisory Board Folder A).

(******) Memo dated 1/24/35, Advisory Council to N.I.R.B. (Deputy's Folder 20-A).

(*******) Volume A, proposal, 9/11/33.

Authority of the so-called "resale price maintenance" provision of the code was expected to result in the general maintenance of resale prices by distributors, with the effect of eliminating or greatly reducing price competition between distributors and manufacturers. (*)

Small producers opposed the resale price maintenance provision, contending that it would be to the advantage of the large-direct selling manufacturers and to the disadvantage of those selling through distributors, because of its tendency toward the elimination of price competition, leaving the big advertisers and those with extensive and efficient sales forces in a far better competitive position than those without a well known trade name, not producing a full line, and not well equipped to compete on any basis except that of price. (**)

The NRA refusal to sustain the Code Authority's interpretation of the code as requiring resale price maintenance resulted in an increasing breakdown of this part of the code program, which, in turn, caused a breakdown in price uniformity, and a recurrence of price competition between producers and distributors. (***)

8. Brake Lining and Related Friction Products Division of the Asbestos Industry (****) (Code No. 80).

Inasmuch as brake lining accounts for about 85% of the total dollar production of friction materials, and was the product on which there was most activity of interest to this study, this summary deals only with brake lining, and does not include the other two friction materials, clutch facings and transmission linings.

(*) Memo dated 9/23/33 from Ind. Adv. Board (Deputy's Folder 316)

Letter dated 2/22/34, from Toof & Co. (Deputy's Folder 316)

(**) Abstract on Public Hearing 9/21/33 (Research and Planning Files, p. 44)

Brief, Warshaw Mfg. Co. (Consumers Adv. Bd. Folder A)

(***) Letter dated 1/18/35, from National Emergency Committee (Deputy's Folder 20-A)

Memo dated 1/22/35, Barnes to Nickalson (Deputy's Folder 18).

(****) The information contained in the following description of a part of the program of the Asbestos Industry has been developed from the Summary of an inquiry into Devices Affecting Distribution in the Brake Lining and Related Friction Materials Division of the Asbestos Industry, contained in Part II. The full report on which the summary was made has not yet been placed in a form which would permit its incorporation in the Appendix, and is contained in work data files of the Distributive Relations Unit in its preliminary form.

Practically all asbestos brake lining is used in automobiles. About three fourths of the total dollar volume of sales go for replacement uses; the remaining one-fourth being sold to equipment manufacturers.

Prior to 1929, practically all of the brake lining was woven from long fibre asbestos, most of which was imported from Canada, though Russia and Africa also supplied considerable amounts. Very little long fibre asbestos is mined in the United States. Three brake lining producers had large interests in Canadian asbestos mines, and controlled the Canadian asbestos price level.

During the 1920's, a method was commercially developed for moulding short fibre asbestos into brake linings. Since the natrual supply of short fibre asbestos far exceeds that of the long fibre, and since there was no centralized control over short fibre production, the price of this grade of asbestos was far below that of the long fibre. Furthermore, moulded asbestos brake lining was originally better adapted for use in internal brakes than was woven lining. The combination of displacement of long fibre by short fibre asbestos and general decline in the demand for spinning fibre for uses other than in brake lining, resulted in considerable declines in the prices of long fibre asbestos.

Between 1929 and 1933, twenty new producers entered the brake lining industry, taking advantage of the declining raw material prices and the relatively high, stable prices for the finished product. These twenty new producers almost equalled in number the old, established manufacturers.

The traditional channels of distribution had been as follows:

(1) Direct sales by manufacturers to equipment manufacturers, both for use in original and replacement equipment and for resale to automobile dealers; (2) to "affiliates" (national or territorial private brand distributors), who resold to jobbers, dealers, consumers, mail order houses and automotive chain stores; (3) to jobbers (for resale to dealers, garages and service stations); (4) to mail order houses and automotive chain stores, reselling mostly to consumers; (5) to dealers (garages, service stations, brake installation shops, etc.); (6) to large industrial consumers (owners of fleets of trucks and busses.)

The old line manufacturers had established extensive distribution facilities and were able to reach and utilize the various distribution channels. The new producers, with no established distribution facilities, and unable to contact large numbers of buyers, were at a disadvantage in finding methods of placing their products on the market. Four or five of the new members, with good financial backing and relatively large production, developed different distribution practices from those adopted by the smaller members. One of the larger members was a manufacturer and distributor of automobile tires, and distributed brake lining through its retail tire shops, company service stations, and independent tire dealers.

Another large new producer sold a major part of its production through two "affiliates" under the brand name of the affiliates, one of which was a manufacturer of automobile parts who had established contact with the automotive parts trade. A third large new producer sold a major portion of its production to the members of a national association of automotive parts distributors. The larger new members were able to participate in the business of equipment manufacturers, mail order houses, and automotive parts chains.

The smaller new members, with insufficient production to secure the exclusive sales services of national or territorial distributors, or to supply the private brand requirements of national or territorial private brand distributors and mail order houses, or to participate in sales to automobile manufacturers, had to depend primarily on sales to jobbers and dealers. However, they had difficulty in gaining access to the regular jobbing trade in competition with older manufacturers, having better known and advertised brands, and they began to offer special inducements to jobbers, through increased discounts, to make the handling of their products attractive to the jobbers.

During the same time when these new members were entering the industry, the depression was causing a severe drop in the total consumption of brake lining. Distributors demanded increased discounts from manufacturers to recompense for their reduced sales volume. Manufacturers, striving to maintain their own sales volume, began bidding for the services of distributors by offering larger discounts.

The combination of the depression and the advent of a large number of new producers in this industry resulted in increased discounts to regular jobbers; the granting to jobbers of exclusive sales territories, the use of national distributors of automotive parts with correspondingly higher discounts to both; and the allowance of jobbers' discounts to individuals engaged primarily in retailing, but doing some selling to other dealers.

For a number of years manufacturers had sold brake lining on the basis of standard price lists, established by the trade association, quoting consumer prices with discounts to the distributors and large consumers. A high degree of uniformity and stability existed, and still exists, between prices to the consumer on comparable grades of brake lining. Most replacement brake lining is sold by dealers installed in the car, with the dealer performing an installation as well as a sales function. Since the average consumer pays for brake lining on an installed basis, there has been small incentive for the average dealer (garage and service stations) to reduce the list price of brake lining. Dealers customarily sell brake lining on the basis of "Flat Rate Guides", setting forth the installed price of various types of brake lining.

Price competition has taken the form of competition on discounts rather than list prices. Even before the depression and the advent of the new producers in this industry, discounts on brake lining were extremely high. Discount totaling from 70 to 80 per cent of list price were not uncommon. During the past four years, discounts as high as 80/10/10/10/10% have been granted, totaling about 87% of list price.

The combined mark-up allowed to the various distributors in many instances amounted to as much as six or seven hundred per cent.

During the years immediately prior to the code, not only were manufacturers directly competing for the favor of distributors by increasing discounts, but also, the very large distributors - national and territorial distributors and "affiliates" - were striving to increase their volume of sales by competing with the manufacturers for the distribution services of jobbers, contributing to the increase of discounts.

To further complicate the picture, private brand buyers utilized the low prices received by them to undersell the brake replacement trade; and "cut-rate" brake shops began to reduce the prices for installed brake lining. By purchasing private brands distributors were enabled to evade the pricing restrictions placed by manufacturers on standard brands and there was a very marked increase in the total proportion of private brand sales as compared to the sales of standard brands.

The Code proponent - a trade association composed mainly of the old line producers - evidently believed that something must be done to stop the trend toward increased discounts and to stabilize distribution practices. The Code contained provisions intended to have this effect. First, "affiliates" were to be included as members of the industry, the definition of "affiliates" to be subsequently submitted in the Merchandising Plan; second, the Code provided for resale price maintenance, through the use of contracts between producers and their distributors; third, the Code authorized the formulation of a Merchandising Plan.

In November 1933, a merchandising plan was unanimously adopted at a general industry meeting. This merchandising plan included:

(1) Definitions of classes of customers, which must be followed by all manufacturers.

(2) Fixed or maximum trade and quantity discounts to each class of buyer. Small manufacturers were permitted to give a ten per cent greater discount to jobbers, dealers and consumers than could be given by large manufacturers.

(3) A considerable number of standard price lists, each manufacturer to make his choice of the list or lists on which he desired to sell.

(4) "Cost floors" were established on popular sizes and types of cut sets, practically amounting to minimum prices. Jobbers were given the highest cost floor. Small manufacturers were permitted to sell at prices 10% lower than the jobber cost floor; and the cost floor to private brand buyers and national and territorial distributors was 10% below the price which small members were permitted to quote to jobbers, dealers and consumers. That is, the private brand buyers and national and territorial distributors could purchase brake lining at a price approximately 19% lower than could be given by the larger manufacturers to jobbers.

The Code authorization of resale price contracts included a provision that such contracts should require distributors buying on any given list to resell on the basis of the same list. That is, distributors were not to be permitted to buy brake lining from an 80¢ price list, for example, and resell that brake lining on the basis of a 70¢ or 90¢ list, which would have meant that their customers would pay either less or more than the price specified by the manufacturer.

In December 1933, the National Automotive Parts Association, the national distributor for one of the new, large manufacture, refused to enter into contracts agreeing to resale price maintenance, and objected to the fixation of maximum discounts. As a result of the attitude of this large distributor, the Code Authority deferred the dead-line date for the signing of resale price contracts, and sought NRA approval of the merchandising plan, with the hope of securing official backing in the enforcement of the plan. A public hearing was held in January 1934 but no decision was made by the NRA until August 1934.

The refusal of large distributors to sign resale price maintenance contracts made it unwise for manufacturers to tie up their other distributors. The Code Authority several times fixed, and then extended, dates by which producers must enter into resale price contracts, and finally abandoned the attempt to require such contracts. This action probably was influenced by the failure of the NRA to approve the customer classification and fixed discounts of the merchandising plan.

It should be noted that although the industry was unable to secure mandatory resale price maintenance contracts with the larger distributors, the reluctance of the distributors to sign was evidently not caused by their desire to pass on to their buyers part of their discounts, but rather that they wished to be free to do so if they found it necessary in order to retain their customers. Throughout the entire code period, there was little evidence of any widespread or material reduction of resale prices by distributors. "Affiliates" - private brand national or territorial distributors, who, before the code had resold brake lining to jobbers, dealers, consumers, mail order houses, and chains, at prices below those quoted by manufacturers to those buyers - during the code period generally maintained the prevailing price levels.

"Cost floors" to private brand buyers broke down during the summer of 1934. It was about this time that large private brand buyers were replenishing their stocks for the replacement market, and pressure became too great for manufacturers to deviate from cost floors. It should be noted that the provisions of the merchandising plan relating to "cost floors" required that prices to private brand buyers could not be lower than 19% below the prices granted to regular jobbers, which meant that prices to private brand buyers would have been greatly increased by the use of these cost floors over the prices at which such buyers had purchased in the past. Prior to the break down of the "cost floors", prices quoted by manufacturers to private brand buyers had not been published. The failure of the NRA to approve and assist in the enforcement of the merchandising plan probably contributed to the difficulties encountered in the operation of the cost floors. In an endeavor to accomplish a greater degree of adherence to the cost

floors, during the summer of 1934 the code authority began the practice of publishing to all manufacturers of private brand brake lining the names and prices of all producers who sold to private brand buyers at prices below the cost floor. For a time, prices to private brand buyers went to even lower levels, but within a couple of months they increased to a point evidently satisfactory to a majority of the members of the industry.

In August, 1934, the NRA acted on the request for approval of the merchandising plan, and refused to give approval to mandatory consumer classification, fixed discounts, and cost floors. (Later, in the Spring of 1935, the NRA approved a permissive customer classification program).

The industry continued to recognize the merchandising plan originally adopted, even without NRA approval of these important sections.

The primary intent of the proponents of this code program appears to have been the restriction of a form of price competition between manufacturers - the granting of increasingly large discounts to distributors in order to secure or retain their services as distribution outlets. Manufacturers were making sales of their standard brands to several levels of distributors - national and territorial distributors, jobbers and dealers - in order to preserve and protect their individual access to these different levels, it was considered desirable to exert some measure of control over the prices granted by national distributors to jobbers and dealers, and by jobbers to dealers, lest these distributors, by offering better prices, cause jobbers and dealers to desert the manufacturers and handle the products sold by the price-reducing intermediaries. The whole program with respect to regular brands would have been endangered by permitting national and territorial private brand distributors to continue to purchase private brand brake lining at prices far below those charged to distributors of regular brands. These private brand buyers in the past had been able to utilize their ability to purchase at low prices to offer to jobbers and dealers prices lower than those offered by manufacturers and distributors of regular brands. The code program operated to increase greatly the prices charged to private brand distributors, thus narrowing the margin upon which they had depended for the making of price concessions to their buyers, and the resale prices of private brand distributors during the code period were closer to the prevailing price levels of regular brands than they had been prior to the code. Furthermore, jobbers were discouraged from handling private brands by the establishment of a minimum quantity on private brand purchases in order to qualify for the private brand discount. Jobbers unable to buy $200 worth of private brand merchandise at a time were required to pay as much for private brand merchandise as they would for comparable regular brands. By these devices, the industry attained a considerable measure of protection against price competition on the part of both standard and private brand distributors.

The program of this industry as a whole appears to have been fairly successful. There was a greater observance of resale prices during the code period than prior thereto. Discounts to the different classes of customers defined in the merchandising plan were reduced, and there was general adherence to the discounts originally established in the merchandising plan. Prices to private brand buyers were increased above the levels

which had prevailed prior to the code, and their operating margins reduced, discouraging price cutting in their resales.

It cannot be said that the code program was entirely responsible for the cessation of increased discounts to buyers, since the market price of raw asbestos increased during the code period. Those same members who entered the industry because of the wide spread between raw asbestos (and asbestos textiles) and the finished brake lining prices to consumers, were now being pinched because consumer prices on brake lining still remained stable, and in some instances decreased, while raw asbestos and asbestos textiles were increasing in price. They did not have as wide a margin as they had previously enjoyed, and were not so susceptible to pressure for increased discounts.

The larger new producers evidently believed that their access to the market - through sales to equipment manufacturers, affiliates, national and territorial distributors, and mail order houses - was well enough assured to permit a stabilization of discount practices without injury to them. The smaller producers were given a 10% differential under the prices quoted by large manufacturers, and although certain of the smaller members claimed that this margin was not sufficient, there was evidently a general acceptance of the differential, as deviations therefrom were not considered to be particularly important.

Since a major part of the program did not receive NRA support, it should be said that the industry itself was primarily responsible for its successful operation.

C. Policy Group 3 Programs

1. Lumber and Timber Products Industry (*) (Code No. 9).

Between 1906 and 1932 the annual per capita consumption of lumber decreased from above 500 feet to less than 100 feet. Since the number of wholesalers and retailers did not decrease proportionately, the result was a very grave falling off in the average volume of sales per retailer and wholesaler, with a resultant increase in their cost of operation per unit. In an endeavor to maintain volume, competition between distributors has been very severe. During the 1920's wholesalers began to increase their sales to the larger industrial users through depriving retailers of the more lucrative carload business and tending to restrict them to less than carload business. To a considerable extent manufacturers, also suffering from decreased volume, began to sell direct to these consumers, thus depriving both wholesalers and retailers of a considerable part of the available business.

By 1926 the situation had become unendurable to retailers and its gravity was recognized also by producers and wholesalers. The less than carload lumber business still accounted for a large percentage of the total sales of lumber, but if retailers were required to depend on this business alone, their per unit operating cost would be so great as to necessitate a higher mark-up, with danger of increasing the cost of lumber to less than carload buyers to a point where they would return in ever increasing numbers to substitutes for lumber.

Trade associations of retailers, wholesalers, and manufacturers attempted to solve the distribution difficulties of the industry, and in 1931 a conference committee, composed of representatives from each of the associations, agreed upon a "statement on the subject of distribution of lumber", in which the retailer was recognized as the proper distributor within his trade territory of all lumber except for the following classes of business:

1. United States Government
2. Shipyards and large dock builders
3. Railroads
4. Large users of industrial lumber buying regularly in carload lots, but not for construction purposes.

This statement expressed the principle that manufacturers and wholesalers should sell direct only to the above listed classes of trade, and would not compete with retailers on sales to other buyers, regardless of size. The retailers supplied the pressure to enforce this agreement by refusing to buy from those manufacturers and re-

(*) This brief description of the program of the Lumber and Timber Products Industry has been summarized from an informal report to the Distributive Relations Unit by the individual assigned to the study of this industry. His employment with the NRA ended before it was possible to place his report in shape for inclusion as a part of the Appendix to the Report of this Unit. This informal report is contained in the work data files of the Distributive Relations Unit, and reference should be made to that report for a more complete description of this industry's program and for details regarding its operation.

tailers who violated the agreement. Pressure was brought to bear on wholesalers by retailers and by manufacturers, since the latter would suffer by a boycott if retailers found that they were continuing to sell to wholesalers who were violating the agreement.

An attempt was made to incorporate the substance of the above agreement in the Code of Fair Competition for the Lumber Industry, but difficulty was encountered in defining the types of industrial users to whom manufacturers and wholesalers could sell direct. The Code was approved with a provision authorizing the Code Authority to submit this classification to the NRA later. Some manufacturers and wholesalers wished to sell direct to all carload buyers. Some of the smaller mills wanted to be permitted to continue the practice of selling direct to users in truck-load lots, particularly those buyers coming to the mills with their own trucks. Carload users wanted to be permitted, to buy direct from producers or wholesalers, thus avoiding the payment of a higher price on purchases through retailers. Retailers demanded that producers and wholesalers be prohibited from selling direct to certain types of consumers, particularly contractors and other buyers of lumber to be used for construction purposes, and urged that producers and wholesalers be prohibited from selling to any consumer buying in smaller quantities at any time than two and one-half carloads.

While this controversy over customer classification was going on, minimum prices on lumber and timber products were established by the NRA, and differentials were fixed whereby wholesalers were given a price differential of not to exceed 8% under the price to retailers, and distribution yards and commission men were given a 5% differential under the retail price.

The proposed program involved a withdrawal from the retail market of manufacturers and wholesalers by prohibiting them from making direct sales to certain industrial consumers to whom direct sales had been made prior to the code. It was a plan to abandon a part of the market to retailers and to protect them in their occupancy of the market.

The proposed code program contemplated a joint occupancy of the wholesale market. That is, manufacturers were permitted to sell direct to retailers if they desired to do so, but wholesalers were given an 8% discount under the manufacturer's price to retailers, thus affording the wholesalers a margin upon which to operate in the sale of lumber to retailers. The minimum prices established under the code applied to wholesalers as well as to retailers, and in effect constituted a sort of resale price maintenance requirement on jobbers. That is, they were prohibited from passing on to their customers any part of the 8% differential which they received. The program contemplated a joint occupancy of manufacturers and wholesalers of the wholesale market, with protection given to wholesalers, and protection to manufacturers against price competition from wholesalers.

The NRA finally ruled that no classification would be accepted whereby a carload consumer was required to pay a price in excess of that granted to wholesalers. This decision in effect virtually eliminated mandatory trade discounts and confined price differentials to quantity discounts. Manufacturers were permitted to sell direct to all carload buyers. Under this ruling the retailers did not secure the protection which they were demanding and the code did not materially change the situation which existed prior to the code period with respect to distribution channels and practices.

Following the code, in August 1935, the three trade association again joined in a "statement on lumber distribution", setting forth again the principle that the retail lumber dealer is the proper distributor within his trade territory of all lumber, except to the following classes of bussiness, commonly sold by manufacturers wholesalers, and retailers:

"A. Sales of lumber and lumber products in carload quantities or more:

1. To wholesalers and retail lumber dealers;
2. To and for the Federal Government, and to and for U.S. Government river and harbor works;
3. To and for railroads and steamship companies;
4. For shipyards, underground work in mines, large docks, large dams and large bridges;
5. To industrials for re-manufacturing, pattern, and shipping purposes.

"B. Sales of lumber and lumber products in less than carload quantities:

1. To wholesalers and to retail lumber dealers and planing mills."

The lumber program proposed to NRA may be said to have included the relinquishment by the manufacturers to the retailers of a part of the market theretofore controlled, to an appreciable extent at least, by direct selling manufacturers. The proposed program included protection to the retailers in that portion of the market abandoned to them. The proposed program also involved a joint occupancy of the market by the manufacturers and wholesalers with a recognized differential to wholesalers, and protection to the direct selling manufacturers against price competition from wholesalers.

Through inability of the producers to agree among themselves, and with retailers, on the basis of a division of the market between direct selling manufacturers and retailers, the assistance of the NRA was required to make an arbitrary division, and the decision of the NRA was not satisfactory to retailers nor to those members depending on retailers to furnish their primary access to the market. As no

material change was made in the situation existing prior to the code, those manufacturers desiring to do so could sell direct to carload consumers, and the code did not require their abandonment of any portion of the market. Actually, the code does not appear to have had much effect on the distribution practices in the lumber industry

2. Plumbing Fixtures Industry (*) (Code No. 204)

This is an industry with approximately 250 concerns producing a great variety of products of various compositions and processes of manufacture, the products of some producers being sold to other producers for combination with, or to supplement, their own products. Most of the producers are "short line producers", very few companies producing all of the types of products classed as plumbing fixtures. Three large companies dominate the industry, partly from point of size and consumer acceptance of brands, and partly through the distribution methods they employ.

The manufacturers depend on plumbing contractors to perform the principal retailing function, combining the retail sale with the installation of the products into plumbing systems. Plumbing contractors depend for an appreciable part of their profit on the sale of plumbing fixtures, as well as on the charge for the installation of such products.

The traditional method of distribution in this industry was manufacturer to wholesaler, to plumbing contractor, to consumer. In recent years there have developed two important deviations from this traditional practice. The smaller and medium sized manufacturers experienced considerable difficulty in finding wholesale outlets for their products, many of the best and largest wholesalers having been taken over by the larger companies, either by purchase or through exclusive contracts. In order for these smaller manufacturers to gain access to the market, many of them found it necessary to increase the sale of their products direct to retailers. Also, those manufacturers experiencing difficulty in finding satisfactory access to the market through the wholesaler-retailer channel commenced to sell direct to large buyers, such as the Government.

The second development which was proving disturbing to the manufacturer-wholesaler-plumbing contractor channel of distribution, was the increase in sales of plumbing fixtures through mail order

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(*) The information contained in the following description of the program of the Plumbing Fixtures Industry has been summarized from the Report on the Plumbing Fixtures Industry, which is contained in the Part II. For a more complete description of this program and for details regarding its operation, reference should be made to the Report itself.

houses. This has aroused increasing fear and resentment on the part of plumbing contractors and wholesalers. The mail order houses do not carry complete lines of plumbing fixtures, but purchase and sell only those products for which there is an active and steady consumer demand, and on which a rapid turn-over can be expected. Because of their size and the large volume of rapidly moving items which they purchase, certain manufacturers (usually in the medium sized class) have granted sizeable quantity discounts to this class of buyers. Since mail order houses performed their own wholesaling function, they claimed and received classification as wholesalers, and through receipt of wholesale discounts plus large quantity discounts, were enabled to purchase at prices below those at which regular wholesalers could buy. As a result, taking into consideration the relatively low purchase price and the fact that the items carried by the mail order houses were only those having a rapid turn-over, the mail order houses were able to offer products to consumers at prices far below those which the wholesaler (with very large, slow moving stock) could meet. Consequently, the plumbing contractors, whose principal source of supply had been the plumbing fixtures wholesalers, found it impossible to compete with mail order houses on those items which the mail order houses carried. Prior to the submission of the Plumbing Fixtures Code, associations of plumbing contractors and plumbing fixtures wholesalers entered into a reciprocal rule whereby the plumbers agreed to make all purchases from wholesalers, and wholesalers agreed to make all of their sales to plumbers. Constant pressure from plumbing contractors and wholesalers played an important part in the formulation of the manufacturers' code. The approved code prohibited sales by manufacturers to consumers. The code classed mail order houses as wholesalers. Wholesalers were to be given prices below those charged retailers and the Code Authority was authorized to establish the differential. Manufacturers' branch houses were to be classed as wholesalers and allowed no price advantage over independent wholesalers. Adherence to these regulations was to be checked by the filing with the Code Authority of lists of customers (the classification of whom could be challenged by the Code Authority), and the filing of prices and discounts. Quantity discounts were limited to 5%, which materially reduced the price advantage possessed by mail order houses over other types of distributors. The Administration did not approve the subsequent recommendation of the Code Authority fixing price differentials between classes of customers.

In addition to these requirements, the manufacturers proposed a mandatory resale price agreement whereby wholesalers could not undercut the prices of manufacturers' branch houses, and the latter could not undersell the independent wholesalers. This provision was rejected by the NRA and never appeared in the approved code. At that time it was expected by the code proponents that the then pending codes for the wholesalers of plumbing fixtures and the plumbing contractors would contain provisions requiring them to maintain the filed prices of manufacturers.

The program of this industry was based on a conscious relinquishment on the part of the manufacturers of their right to sell direct to consumers, thus abandoning this market to retailers and wholesalers.

The program contemplated a joint occupancy of the wholesale market, in which independent wholesalers were protected against competition from manufacturers selling direct to retailers by the establishment of fixed differentials and by an agreement by manufacturers to treat their own wholesale branches in the same manner as they treated independent wholesalers; manufacturers sales to retailers through their own branch warehouses were to be protected against price competition from independent wholesalers by an agreement on the part of such independent wholesalers not to resell at less than the manufacturer's published prices to retailers. Thus, they also contemplated the control of price competition of wholesalers with direct selling manufacturers in the wholesale market. Moreover an endeavor was made to protect the wholesalers and the plumbing contractors against mail order houses by reducing the price advantage possessed by such organizations.

The probable effect of such a program, had it operated as contemplated, would have been to the advantage of the larger members of the industry having well-known brand names, national advertising and national distribution, and a control either financial or by contract over most of the better grade of wholesalers. The successful operation of the program would have reduced the volume of products going through mail order houses, and this would have been to the disadvantage of those medium sized members of the industry depending on such sales outlet for the distribution of appreciable percentages of their production. Those manufacturers who had been making sales direct to large consumers would, of course, be handicapped through the provision prohibiting the continuance of such sales.

The code, however, did not operate to accomplish these things. The code breakdown began with the refusal of manufacturers having mail order contracts to file their contracts or the prices on their sales to mail order houses. There was wide-spread lack of compliance on the part of manufacturers with the provisions requiring the filing of prices and lists of customers, prohibiting sales to consumers, and relating to the classification of customers.

The code breakdown was so complete that in the Spring of 1935 the trade practice provisions of the code were deleted.

IV. COMPARATIVE SUCCESS OF ALTERNATIVE DISTRIBUTION POLICIES.

A. Policy No. 1

The industries which adopted Policy No. 1 were interested in promoting direct selling by manufacturers to a particular market or a segregate part of a market, and the elimination of competition with distributors in that market or segregated part thereof. Of the industries selecting programs incorporating Policy No. 1, the cement industry may be said to have achieved a considerable degree of success.

Of the two other industries in the group, the Salt Industry was moderately successful in the early days of the code, but the program broke down toward the end. The Wood Cased Lead Pencil Industry was unsuccessful.

B. Policy No. 2

The industries which adopted Policy No. 2 recognized the necessity or desirability of a joint occupation of the market, or a major part thereof, by direct selling manufacturers and independent distributors, but sought to eliminate or subjugate price competition between manufacturers and distributors through some measure of manufacturer control over distributors' prices and selling practices. Of the industries selecting programs incorporating Policy No. 2, the following achieved a considerable degree of success:

Carpet & Rug Manufacturing Industry
Agricultural Insecticide and Fungicide
Fire Extinguishing Appliances
Asbestos (Friction Materials Division)

The code programs of the following industries, incorporating Policy No. 2, failed to achieve any substantial success:

Cork
Funeral Supplies
Valves & Fittings

The Business Furniture Industry experienced considerable success in the early stages of the code period, but its program broke down toward the end.

C. Policy No. 3

The industry programs involving Policy No. 3 were aimed at the abandonment by direct selling manufacturers of a market or a segregable part of a market, leaving the same to distributors, thus eliminating competition between manufacturers and distributors in that market. Of the industries studied, only two incorporated Policy No. 3 as a major part of their program, and neither of these programs operated successfully. These two industries were:

Lumber & Timber Products
Plumbing Fixtures

It is apparent from the above recapitulation that in no instance did all of the industries adopting any one policy succeed in achieving their objectives. Of the industries adopting Policy No. 1, two failed and one succeeded; of the industries adopting Policy No. 2, four failed and four succeeded; of the two selecting Policy No. 3, both failed.

It is apparent that no one type of program policy, in itself carries any assurance of success in operation. For factors determining success, it is necessary to look beyond the type of distribution policy adopted, to the characteristics of the industry and the situation in which the attempt was made to apply the policy.

V. ANALYSIS OF FACTORS DETERMINING SUCCESS OR FAILURE OF DISTRIBUTION POLICIES

A review of the industries which were able to evolve a distribution program which gave promise of a degree of continuing success in realizing their aim yields the following common characteristics which account for that result:

1. In each of these industries there was a common acceptance of a single program for the industry, resulting either from voluntary agreement, successful compromise of conflicting interests, or from the acquiescence by any minority group in the superior power or leadership of a dominant concern or group.

2. In each instance, the industry program conformed with the maximum of industry control consistent with industry harmony, the extent of the concessions made usually varying inversely with the degree of dominance and power of the program sponsors.

3. In each instance, little actual dependence was placed on NRA support and enforcement, except for the approval of mechanics to start the program. Once the administrative equipment was established, each industry was able for the most part to administer its own program.

Turning to those industries where the code program did not affect an adjustment in distributive relations such as to indicate a prospect of continued operation, there are also very definite common characteristics which account for the result:

1. There was a lack of common acceptance of the code program in the industry, due either to a failure to compromise the conflicting interests with a recognition of each, or to the absence of sufficient power in the code sponsors to force acquiescence in the program by the dissenting minority without government support.

2. In each instance the success of the program depended on NRA enforcement and policing to overcome the opposition of the dissenting group. Failing to secure the necessary support, the program broke down.

VI. CONCLUDING STATEMENT

The part played by NRA in the regulation of distribution in manufacturing industries was apparently largely limited to affording exemption from the restrictions of the anti-trust laws. The aims of the code proponents were most nearly realized where there was a high degree of industry acceptance of their value: and, to the extent that dependence was placed on securing a unity of action through the power of NRA, the program broke down when NRA failed to give the necessary support. What would have happened if NRA had been willing to give the full support requested by the less successful industries must remain, of course, open to conjecture.

Much more fundamental than the mere fact of success or failure is the question as to whether a sound public policy could accept or promote the aims of the program. In NRA there was no definite continuing policy as to the proper public ends in connection with control of distributive relations. Such a definite policy could not be formulated without a precedent analysis and understanding of the character and intent of such controls as proposed by industry. In the present study, an approach to an analysis and an interpretation has been made on the basis of such facts as were available in NRA experience. The study stops with the analysis and interpretation, however, the task of evaluation being beyond its scope. None the less, it is desirable to suggest the character of the broader issue.

The examination of control efforts has revealed that in many instances code programs simply implemented previous manufacturer efforts at price and distribution control. In such cases there arises the question as to whether the government wishes to lend its support to the pre-existing effort, and whether it wants to sanction its extension. This problem very quickly extends itself to the whole problem of the social value of competition, the areas in which it should be promoted or limited, and the kind of accompanying controls essential for the protection of efficient operation and for consumer protection.

In certain cases the code effort was directed at the restriction of one or another dissenting group in the industry, such as mail order houses or small manufacturers not conforming to the generally accepted industry trade practice pattern. Here there is presented the problem as to how far the government wants to close the door to freedom of action in the market, with its hope of encouraging new methods and new processes, and how far it prefers to rely on the hope of a more stable industrial market operation such as is conceivable with close integration and centralized control.

Policy problems such as those set forth are present whether the government expects to act positively in the promotion of industry self-regulation or prefers to rely on a policy of free market operation. The fact that a large measure of control already exists in many industries indicates that almost as great a degree of positive action by government is essential to the promotion of a free market as is necessary if it elects the policy of a controlled market. Either way, there is the central issue: How much control should be promoted, permitted, or tolerated, and with what safeguards in the way of continuing government supervision?

PART B

INDUSTRY CASE STUDIES OF TRADE PRACTICES AFFECTING CHANNELS OF DISTRIBUTION AND MARKETING METHODS

I INDUSTRY BACKGROUND(*)

A. Product

The Code of Fair Competition for the Salt Producing Industry, as amended, defines the Salt Producing Industry as "the production and sale by the producer of salt (sodium chloride) as such." This definition excludes the production and/or sale of salt brine, and includes as members of the Industry only those persons and concerns engaged in the production and sale of salt in solid or crystalline form.

Salt falls within two general classifications - rock salt and evaporated salt. Rock salt is produced by a mining operation comparable to that of coal mining. It may be sold in the form in which it comes from the mine - as "lump rock salt" - or it may be crushed into varying degrees of fineness.

Evaporated salt is divided into three types - vacuum pan, grainer, and solar evaporated. Vacuum pan salt is made by the application of heat to a salt solution while in a partial vacuum. The salt solution, or brine, is usually produced by sinking a shaft into a salt deposit and forcing water down this shaft. As the water becomes saturated with salt, it is forced to the surface and then evaporated. Salt produced by the vacuum pan process is composed of grains which are cubical in shape, the size of which depends on the speed with which the water is boiled away.

Grainer, or open pan evaporated salt, is made from a salt brine (produced in the same manner as that from which vacuum pan salt is made), but in the grainer process the water is evaporated by the application of heat to large, shallow open pans, under normal air pressure. The salt produced through this process is composed of grains or flakes more irregular in shape than those resulting from vacuum pan evaporation.

Solar evaporated salt is produced only in the Western States, as this process is commercially feasible only in regions where there is little rainfall and consistent sunshine over long periods of time. Salt brine from the ocean or from salt lakes (such as the Great Salt Lake in Utah) is impounded in huge, shallow containers from which the water is evaporated by the sun, leaving a deposit of salt. Solar evaporated salt is comparable to rock salt, in that both are produced at low cost, and both contain more impurities than appear in vacuum pan or grainer salt. In California, some solar evaporated salt is re-dissolved and the resulting solution is evaporated by the vacuum pan process, thus producing a purer, higher grade salt than the original product. (1)

(*) The cooperation of the Federal Trade Commission in making available to the writer information gathered by the Commission relative to the Salt Industry, has been of material assistance in the preparation of this report.

B. Production And Values

The following table shows the amount and value of the salt produced by each of the above described production processes:

Types of Salt Produced

(Mineral Yearbook, 1934, and Mineral Market Report No. M.M. 5, 364, April 26, 1934 - U.S. Bureau of Mines)

	1932		1933		1934	
	Tons (000)	Value (000)	Tons (000)	Value (000)	Tons (000)	Value (000)
Open or grainer evaporated	592	$4,447	573	$4,634	541	$4,411
Vacuum pan evaporated	1,073	7,197	1,311	8,123	1,267	8,191
Solar evaporated	269	944	322	1,178	333	1,171
Rock Salt	1,558	4,949	1,754	5,402	1,884	6,140
Pressed blocks from evaporated salt	119	848	153	1,130	139	999
Pressed blocks from rock salt	27	153	31	169	29	166

List No. 1, in the Addenda, shows the production of evaporated salt and rock salt each year from 1920 to 1934, inclusive, and the average value per ton of both types of salt in each of these years.

The average annual value of the salt produced from 1920 to 1934, inclusive, was about $23,500,000. The average annual value of salt produced from 1922 to 1929, inclusive, was about $25,000,000. The annual dollar production since 1921 ranges from a high of slightly over $26,000,000 in 1922 to a low of $18,500,000 in 1932. The 1933 production was slightly over $20,500,000, rising in 1934 to about $21,000,000. (2)

The annual tonnage production of salt fluctuated less than did the value of salt. The average annual tonnage of all salt produced from 1920 to 1934, inclusive, was about 4,200,000 tons. The average annual production from 1922 to 1929, inclusive, was about 4,400,000 tons. The annual production ranged from a low of 3,400,000 in 1921 to a high of about 4,650,000 in 1928. Production in 1932 fell to 3,600,000 tons, which increased in 1933 to slightly more than 4,100,000, and in 1934 to about 4,200,000 tons. (2)

The average annual tonnage production of rock salt from 1920 to 1934, inclusive was 1,952,000 tons; the average annual tonnage production of evaporated salt during these years was 2,268,000 tons. During the past ten years, the average value of rock salt has ranged from $2.90 to $3.40 per ton, with an average value for the ten years of about $3.20 per ton. The average value per ton of evaporated salt has gradually declined during the past ten years, the average value during the past two years being $6.40 per ton - just twice that of rock salt. (2)

C. Uses For Salt

According to the 1934 Encyclopedia of the Social Sciences, the industrial requirements for salt developed chiefly during the past century, are still second to food uses, although likely to assume first place in the near future.

This reference to "food uses" embraces both the domestic, or household, consumption of salt, and its use in the commercial preparation of food. Data gathered by the U. S. Tariff Commission indicates that about one-fifth of the total tonnage of salt goes to household use.(3) Of this one-fifth, the major portion is table salt, composed primarily of vacuum pan evaporated salt.

In addition to household food uses, large quantities of salt are used in the commercial preparation of foods - by bakers, canners, cheese manufacturer , pretzel manufacturers, biscuit and cracker manufacturers, etc. A major portion of the salt going to these buyers is grainer, or open pan evaporated salt, and is referred to in price lists issued by salt manufacturers as "high grade industrial salt." (4)

Meat packers use large quantities of rock salt in the curing of meat, and rock salt is also used in the making of ice cream and ice. (4)

Other important industrial uses for salt embrace the bleaching of paper and textiles; the tanning of leather; the preparation of animal feeds and direct use as salt lick; as a fertilizer to assist in releasing potash in the soil; soap manufacturing; oil, gold, silver, copper and steel refining; by railroads for the melting of snow and ice from tracks and switches. (4)

Chemical companies require large quantities of salt for use in their operations. Prior to 1900, chemical companies relied largely on purchases of salt from salt manufacturers to meet their requirements. During the past 30 to 40 years, chemical manufacturers began to locate their plants near limestone deposits and salt deposits, and in increasing numbers began the production for their own use of these two basic raw materials. Thus, there has resulted a decreasing demand for evaporated or rock salt for chemical purposes. At the present time, about 45 per cent of all salt produced is produces and used in the form of brine by chemical companies.

The following quotation, taken from an article on Salt in the 1934 Encyclopedia of Social Sciences, relates to this situation:

> "A very large, and steadily increasing, fraction of the total output (of salt) - 43 per cent in 1931 - is never placed upon the market as actual salt, but is (produced and) used by chemical companies in the form of brine..... This has narrowed the areas available (for exploitation by salt companies) and has facilitated concentration of the greater salt producing fields in a few hands."

According to the U. S. Tariff Commission, 90% of all rock salt is classed as industrial salt, less than 10% being sold for domestic consumption. (3) Some rock salt is prepared for table use, and is sold as such in the South at a slightly lower price than evaporated table salt. Most of the so-called "domestic" rock salt probably is used in home ice cream freezing, curing of meat on farms, etc.

Because of its flaky texture, grainer evaporated salt is not well adapted to household use, and an important, if not the primary, use for this type of salt is in the commercial preparation of food products.

Vacuum pan salt is used for a wide variety of purposes. Between a quarter and a half of this type of salt is sold as table salt, the remainder being used for industrial purposes, some probably going to food processors, the remainder to various other types of endeavor.

On the West Coast, solar evaporated salt largely is used for the purposes for which rock salt is used in the East, and is used for the salting of fish, as well as for most of the industrial uses above set forth. Some solar evaporated salt, after refining, goes to table use, although the percentage probably is very small.

According to a statement made by a salt manufacturer in a letter written in 1919, rock salt is not competitive with evaporated salt. "I am sure that a careful investigation will clearly show that competition between these two products is, and always will be, practically nothing. At various times, when we have been long on evaporated salt and short on rock salt, we have endeavored to switch some of our customers over to evaporated salt, but without success." (36)

This statement is in conflict with a statement made by a salt manufacturer to the author of this report during an interview in January, 1936. (5) This salt producer stated that evaporated salt is better adapted to certain industrial uses than is rock salt, because of the greater purity of evaporated salt and the fact that evaporated salt is more readily soluble. In many industrial uses, such as the tanning of leather or the bleaching of paper, the salt is dissolved to form a brine, and the speed and ease with which the brine is formed becomes a factor in the determination of the type of salt to be used. Because evaporated salt possesses the advantages of greater purity and solubility, many industrial users are willing to pay a premium for it. However, the price of rock salt has a direct influence on the price of evaporated salt.

If the differential between these two types of salt becomes too great, industrial users turn to rock salt, the disadvantages incident to the use of this salt being outweighed by the saving in cost. So actually, rock salt and evaporated salt are potentially competitive, the actual degree of competition depending upon the size of the differential in price between the two kinds of salt.

D. Where Salt Is Produced

Salt is produced commercially in only 12 States of the Union: Michigan, New York, Kansas, Ohio, Louisiana, California, Texas, West Virginia, Utah, Oklahoma, New Mexico, and Nevada. The production of New Mexico and Nevada is negligible. The following list of salt producint States, together with the percentage of salt tonnage produced by each, was compiled from the U. S. Tariff Commission report on the salt industry.(3)

Michigan	26%
New York	23%
Kansas and Oklahoma	16%
Louisiana	12%
California	12%
Ohio and West Virginia	7%
Texas	3%
Utah	1%
Nevada and New Mexico	Negligible

Table No. 1, Addenda sets forth the production of salt, by kind, in each of the producing States. It will be observed that Ohio and West Virginia produce no rock salt; that California produced very little rock salt (producing primarily solar evaporated salt); that Louisiana produces a little evaporated salt, but specializes in rock salt; that Kansas and New York, although important evaporated salt producers, produce more rock salt than evaporated salt; and that Michigan, the largest producing state, produces five times as much evaporated as rock salt.

There has been little change in the relative position and importance of the various producing States in recent years.

E. Salt Producers

During the latter part of the 19th century, the Salt Industry was composed of a large number of salt producers, primarily engaged in the production of salt for sale to nearby buyers. In many instances, salt was produced only as a by-product of some other activity. During this period, the volume of production was high and prices were low.(5)

The National Salt Company (concerning whose previous history no information is available) conceived the idea of formulating a salt trust. This company entered into contracts with a large number of salt producers whereby the National Salt Company agreed to purchase all of the salt produced by each producer, and each producer agreed to sell only to the National Salt Company. These contracts usually specified a comparatively high price for a certain number of tons, and a very

low price for all salt produced over that amount. For example, a salt producer might have a plant capable of producing a hundred thousand tons a year. His contract would provide that the National Salt Company would purchase 50,000 tons at $8.00 per ton, but that any salt produced by him over the 50,000 tons would be purchased by the National Salt Company at $1.00 per ton. Through these contracts, the National Salt Company made it profitable for salt manufacturers to produce a smaller amount of salt than they otherwise would have produced, and by reason of its monopoly on salt, the National Salt Company could resell the salt at a profit. During the time this program was in operation, the National Salt Company gained a considerable financial interest, if not outright ownership, in a large number of salt plants.(5)

During the 1890's or in the early 1900's, the National Salt Trust failed. No definite information has been developed as to the circumstances responsible for its failure. Inasmuch as it was about this time that chemical companies commenced the trend toward production of their own salt needs, it may be that their entrance in the salt producing field was partially responsible for the failure to maintain a monopoly over salt sales.

Whatever the causes, the National Salt Company failed. Creditors of the company took over control of many of National's plants. The Morton Salt Company - already an important western producer - became the largest producer west of the Allegheny Mountains. From the wreckage of the National Salt Company was formulated the International Salt Company, becoming the largest producer in the East.(5)

The number of salt manufacturers declined steadily from 1899 to 1933. According to the 1933 Census of Manufactures, published by the U. S. Bureau of the Census, there were 159 salt producers in 1899; 146 in 1904; 124 in 1909; 98 in 1914; 86 in 1919; 79 in 1921; 75 in 1923; 70 in 1925; 58 in 1927 and 1929; 53 in 1931; and 50 in 1933. During this same period, the number of employees remained remarkably stable, ranging from 4,774 in 1899 to a high of 6,800 in 1923, then down to 5,458 in 1929, and 4,728 in 1931.

According to the 1934 Mineral Yearbook, published by the U. S. Bureau of Mines, there were 52 salt producers in 1933, operating 70 plants. Of these 52 companies, 10 (operating 11 plants) produced salt and salt brine for chemical uses. 6 or 7 others produced calcium chloride, bromine, or other products, their salt production for sale being comparatively unimportant. It thus appears that in 1933 there were only some 35 companies engaged primarily in the production for sale of rock and evaporated salt.

These 35 companies operated some 53 or 54 plants. (See List No. 2, Addenda for list of salt producers, their location, and type of salt produced.)

In view of the fact that the annual tonnage volume of salt production has varied so little over a long period of years (See Table No. 2, Addenda), it seems plausible that the decline in number of concerns

engaged in the industry is attributable to the concentration of production in fewer hands, rather than a decreasing volume of production, or a declining total demand for the product of the industry. However, it appears that there has been a decided change in the market for salt since 1900, which probably facilitated the reduction in number of plants.

As has already been stated, duringthe past thirty to forty years large industrial consumers of salt (principally chemical companies) have commenced the production of salt brine for their own use, until about 45 per cent of the total output of salt is composed of salt brine, which is never placed on the market as salt.

The lessened demand for crystalline or solid salt for chemical uses appears not to have resulted in any marked decrease in the total production of such salt, either rock or evaporated, probably because of the increasing population of the United States, with a resultant increased demand for salt for human consumption; and the increased industrial activity of the country, causing an increase in the demand for salt for industrial purposes other than chemical.

However, this narrowing of the market for rock and evaporated salt, and the necessary, though gradual, shift in the direction of sales effort, probably found many producers, who had been selling a considerable portion of their output to chemical companies, poorly equipped to enter into effective competition in the sale of table salt with producers who had long specialized in the production and sale of that type of salt.

As a result, whether through bankruptcy or through amalgamation with other producers, the number of concerns steadily declined.

A comparison between the Salt sections of the 1919 and the 1929 Census of Manufactures, develops some interesting information regarding the decline in number of salt producers over a period of ten years. For both 1919 and 1929 the total dollar volume of production was very nearly the same - between thirty-seven and thirty-eight million dollars. The following table indicates the number of establishments, their relative size and the production of each size group.

Value of Products per Establishment	Number		Percentage of Total Production by Value	
	1919	1929	1919	1929
TOTAL	86	58	100%	100%
$500 - $4,999	12	--	0.1	--
5,000 - 19,999	9	3	0.3	0.1
20,000 - 99,999	15	9	2.2	1.4
100,000 - 499,999	29	20	22.3	13.6
500,000 - 999,999	10	12	18.2	21.1
1,000,000 and over	11	12	56.9	63.8
2,500,000 and over	--	2	*/	*/

*/ Data included in class immediately above to avoid disclosing figures for individual establishments.

The 1929 Census tabulation did not include establishments producing under $5,000 worth of salt per year. It will be observed that in 1919 this class of producer accounted for only one-tenth of one per cent of total production.

This comparison indicates clearly the tendency toward the concentration of salt production in the hands of larger establishments. In the ten year period between 1919 and 1929, the number of establishments producing between $5,000 and $20,000 annually decreased 66 2/3%; those between $20,000 and $100,000 decreased 40%; those between $100,000 and $500,000 decreased 31%. On the other hand, the number of establishments producing between $500,000 and $1,000,000 increased 20%; and the number producing over $1,000,000 increased 27%.

In 1919, establishments whose individual annual production was under $500,000, accounted for 25% of the total production of salt; in 1929, establishments in this size class accounted for only 15% of the total production. Establishments in the million dollar class increased their percentage of total production from about 57% to about 64%, accounting for most of the decrease in the business of the smaller concerns.

In 1933, the International Salt Company, with six plants, was the largest producer of salt in the United States. Three of these six plants produce rock salt, and the others produce evaporated salt.

The Morton Salt Company, with eight plants, all of which produce evaporated salt, is the largest producer of evaporated salt in the United States. Morton also is an important factor in the rock salt business, as one of the eight plants produces rock salt as well as evaporated salt, and in addition, Morton Salt Company sells for International the rock salt which is produced in International's Michigan salt mine.(5)

International is the dominant member of the industry in the East, and Morton is the dominant member in the Middle West and West. In addition, through extensive advertising and nation wide sales effort, Morton dominates in the sale of table salt throughout the country.

Of the 35 companies which are members of the Salt Producing Industry, 2 (Morton and International) are large; 12 or 13 are middle sized; and the remainder are small, conducting little advertising, having small sales forces, and little known brand names.(5)

One company owns eight plants; one owns six plants; one owns three plants; and five own two plants each. Eight companies own half of the plants, the remaining plants being owned by separate companies.(6)

The above enumerated fifty-odd plants are engaged in the production of rock or evaporated salt. In addition, there are 10 companies engaged in the production of salt brine for their own use. 4 of these 10 companies sometimes produce evaporated salt, and sell it in competition with, or to, the regular salt producers.(7) The amount of salt so produced and sold is not great in volume when compared with the total output of the salt industry, but is capable of disturbing the market price for salt because the companies which produce salt only as an incidental product are willing to dispose of it at any price necessary to promptly move it, without figuring costs on the same basis as regular salt producers.(5)

Of the 35 companies considered to be members of the Salt Producing Industry, two are subsidiaries of corporations primarily engaged in the production of foods. The Diamond Crystal Salt Company (said by the magazine, "Fortune", to be the fourth largest salt producer in the country), is owned by General Foods Corporation.(8)

The Independent Salt Company, with a rock salt mine in Kansas, is affiliated with or controlled by two meat packing companies - Swift and Company, and Armour and Company. It is operated primarily to supply rock salt to meet the requirements of these two packing companies, but produces more salt than they need. The excess production is sold on the open market. The following letter, from the Carey Salt Company to the Code Authority of the Salt Producing Industry, dated May 17, 1934, is of interest:

> "There are five salt mines in Kansas with a total tonnage of 450,000 tons. Four of these companies are doing a regular commercial and distributive salt business. The Independent Salt Company of Kanapolis, Kansas, is owned by Swift and Co. and Armour and Company, and their chief function is to supply Swift and Armour with their rock salt requirement. The rock salt requirements of these two companies would run approximately 100,000 tons or better per year. In the course of production, they produce various grades and sizes. It is not possible for these two companies to utilize the entire amount of fine (No. 4 crushed salt) so they have a surplus of No. 4 crushed rock salt which they are compelled to move in order to facilitate their operation and which they feel they can move at a very cheap figure. The salt producers of Kansas have not for many years been able to maintain a price on rock salt comparable with the fair prices which have been maintained in other fields; namely, $5.00 and $6.00 per ton. The going price in the Kansas field has not been over $4.00 per ton for some time, and in similar cases No. 4 crushed rock salt has been sold to the commercial trade as low as $2 per ton in order to compete with Independent salt company's

surplus No. 4 stock. The Independent Salt Company takes the position, that they must supply retail dealers or any carload buyers on the same basis as they sell Swift and Company and Armour and Company. They have charged a slight overage for truckload lots above the carload lot price. Every effort has been made to release the Independent Salt Company of its surplus of fine salt by an outright purchase of the same or by handling the sales of same, but whenever the matter has been discussed, the Independent Salt Company continues of the same opinion that they have maintained; namely, that they should continue to handle the operations for themselves."(33)

F. Relative Production Costs

Rock salt, the major part of which is mined in Louisiana, New York, Kansas, Michigan and Texas, costs less to produce than evaporated salt (with the possible exception of solar evaporated salt.) Grainer or open pan evaporated salt is said to cost more to produce than vacuum pan salt, primarily because of the higher fuel cost and the longer period of time required to complete the evaporating process.(5)

From 40 to 50% of the cost of manufacturing vacuum pan evaporated salt is general overhead cost. It is said that it would cost a half million dollars to construct a modern, efficient plant to produce vacuum pan salt, this amount to include expensive machinery, buildings, location, and expenses until the plant was operating on a paying basis.(5)

Fuel cost is the most important item of direct cost in the vacuum pan process, exceeding labor cost.(5)

Little information is available regarding costs of producing grainer or open pan evaporated salt. Since the capital investment in grainer plants evidently is not so high as in the case of vacuum pan plants, with a corresponding reduction in depreciation charges and perhaps taxes, the overhead cost is lower, and fuel and labor costs are higher than in the case of vacuum pan salt.

The principal cost in rock salt production is labor cost.(5) Probably the greatest saving in cost in rock salt mining, as compared to evaporated salt, results from the lower investment cost and depreciation charges, and from the absence of fuel costs.

Nothing is known regarding the production costs of solar evaporated salt, except that the cost is considerably lower than other forms of evaporated salt.

So far as this investigation discloses, there does not appear to be any marked variation between different producing fields in the cost of manufacturing vacuum pan or grainer evaporated salt.

Because of lower labor costs, Louisiana and Texas rock salt mines probably have a lower cost of production than Kansas, Michigan or New York rock salt mines. This saving in cost is offset by the greater transportation costs to industrial centers.

G. Salt Producers' Association

The Salt Producers' Association was formed in 1914, with a membership of 20 producers of evaporated salt, who produced approximately 75% of all evaporated salt. The rock salt industry was not included, although evaporated salt producers produced and distributed more than 50% of the rock salt then mined. Chemical manufacturers, producing salt brine for their own use, were not members of the association. In 1932, there were 22 members of the Association, who produced $9,217,000 worth of salt, as compared with 32 non-Association members who produced $8,879,000 worth of salt. Inasmuch as rock salt producers did not then belong to the Association, it appears that members of the Association produced most of the evaporated salt - probably close to 75%, as in 1914. According to a statement made at the public hearing by the President of the Association, members of the Association at that time produced 90% of all salt produced for sale in the United States.(34) In 1933, the by-laws of the Association were amended to provide for Associate members of the Association, for code presentation purposes. 16 non-association members became Associate Members.(9)

A copy of the minutes of an Association meeting on July 26, 1933, indicates that the following companies were members of the Association:

International Salt Company
Morton Salt Company
Diamond Crystal Salt Company
Carey Salt Company
Colonial Salt Company
Union Salt Company
Myles Salt Company (10)

In 1922, the Federal Trade Commission found that the following firms in addition to those named above, were members of the Association, and it seems likely that they still are members:

Worcester Salt Company
Hulkey Salt Company
Barton Salt Company
Anthony Salt Company
Ohio Salt Company (11)

The by-laws of the Association declared its purpose to be the preservation of standards of quality, and the making of uniform changes in such fixed standards as were deemed desirable; making of uniform sizes, styles and forms of packages; standardization of methods of figuring cost; discovery and transmission to members of new uses for salt. The by-laws also contain this statement:

"It shall be thoroughly understood by members of the Association that all information reported to the Association or distributed by it is purely statistical, and pertains only to past transactions, and that no part of the machinery of this Association will be permitted to be used to fix prices for the sale of goods, or to divide the territory, or limit or control competition; and no information shall be collected or distributed respecting any price which any member intends or expects to ask."

The Association maintains three standing committees:

(1) Transportation. This committee shall furnish to the Secretary's office freight rates compiled for all shipping points in the territories supplied with salt by members of the association.

(2) Simplified Practice. This committee is to assist in the establishment and adoption of simplified practices and standards of salt packages.

(3) Trade Relations. This committee shall keep the Association informed on trade developments of interest to the members, and shall offer recommendations whenever they promise to benefit the industry, the trade and the consuming public. (12)

Among the past activities of the Trade Association were the following:

Securing of a copy of all invoices of sales made by members of the Association. Upon request from association members, the Secretary of the association, by perusal of invoice records, was able to advise the inquirer which manufacturer was supplying salt to a certain buyer.

Securing complete list of all brokers handling salt for various members, and advising members which brokers have been dropped because of connection with buyers.

Advising members of the association the amount of brokerage allowed by other members, and indicating the maximum amount which seems desirable.

Compiling State Freight Rate Books for use in connection with the published prices of each member, in order to arrive at a delivered price. (36)

H. Selling Practices.

1. Sales made on a delivered basis.

For many years, it has been the practice of the salt industry to sell salt on a delivered basis, rather than f.o.b. plant. No definite information has been developed as to the length of time this practice has prevailed.

2. Marketing Areas and Freight Equalization.

As has already been mentioned, transportation cost is a very important item in the ultimate cost of salt to the buyer. One salt manufacturer estimates that freight cost amounts to more than 50% of the average cost of salt delivered to the buyer. (5) The practice of absorbing a portion of freight costs, in order to widen marketing areas in competition with other producers or producing fields, or to retain markets being invaded by other producers, became a form of price reduction fully as important as a reduction in the base price of salt. Freight cost became to the producer as much an element of cost as manufacturing cost.

Any program for the stabilization of prices must include the stabilization of freight absorption. By 1916, the industry was operating under a freight equalization program embracing some of the points of a basing point and a zoning system.

The country was divided up into a number of "marketing areas" (sometimes also called "freight areas") which corresponded roughly to the different producing areas. As has already been stated, salt is produced commercially in only 12 states of the Union. Of these, two states (New Mexico and Nevada), produce a very small quantity of salt. Prior to 1930, Oklahoma was not considered to be of sufficient importance to warrant its separate consideration as a producing field. The Salt Industry considered that there were eight producing fields in the country, as follows:

New York
Ohio and West Virginia
Michigan
Louisiana
Kansas
Texas
Utah
California

A "natural marketing area" for each producing field was agreed upon, with certain States falling into a joint marketing area for two fields. No information has been developed as to the time when the industry first established these marketing fields, nor is definite information available as to the exact boundaries of each field. All that is known definitely is that marketing areas were established and recognized in the industry by 1916 - two years after the formulation of the Salt Producers' Association in 1914. Whether the Association was responsible for the establishment of the "marketing areas", or whether they were in existence before 1914 is not known. The transcript of the Public Hearing on the Salt Code contains statements to the effect that marketing areas "have long been recognized in the Salt Industry", and that "these areas have been amicably divided in the past". (14)

A review of price lists in effect prior to the code (15) indicate that the marketing areas in 1932 closely corresponded to those recognized during the code period, with the exception that the Oklahoma producing field was granted a marketing field which was not recognized before.

History No. 1-Addenda is a copy of a bulletin issued by the Salt Producers Association in September, 1933, containing the Code Authority's definition of the "natural marketing territories". Reference to this history will give a general idea of the situation prevailing both before and during the code period.

The Michigan-Kansas marketing area is unique in that it contains no producing field, but is a joint marketing field between the Michigan and the Kansas producing fields.

The primary purpose underlying these marketing fields appears to have been an attempt to recognize certain areas as naturally belonging to certain producing fields. There was a general understanding to the effect that producers in one area would not attempt to invade the natural marketing area of another producing field by undercutting the prices of the producers of that field. The dumping of salt in another marketing area, in order to maintain volume and low unit cost, was frowned upon. The establishment and recognition of "natural marketing areas" evidently was intended to stabilize markets and to eliminate price cutting as a means of extending markets.

For example, it was the practice for Kansas producers to refrain from quoting a delivered price to points in the Michigan marketing area lower than the price quoted by Michigan producers. In the case of a joint marketing area, such as the Kansas-Michigan area, no outside producer, such as an Ohio or Louisiana plant, would undercut the prices quoted by Kansas or Michigan producers to any point in the Kansas-Michigan area. Thus, producers in each area were enabled to determine their own minimum prices for their local areas, without fear of being undersold by outside producers. Such an arrangement probably was of advantage to large companies, such as Morton (with plants in five different producing areas), and International (with plants in three different producing areas). At the same time, it gave a measure of protection to other producers in areas such as Ohio, where neither International nor Morton had plants.

(See History Nos. 1 and 2, Addenda).

It is of interest, however, that the areas in which the two largest companies had plants, plus the intermediate or open market areas, such as Kansas-Michigan, include 44 out of the 48 states of the Union, leaving only four - Ohio, West Virginia, Virginia and Oklahoma - in which neither Morton nor International could cut prices.

The sizes of marketing areas were not uniform, nor were they entirely based on transportation costs. Other factors, such as the importance of the producing field and its potential productive capacity, and the population and potential consuming capacity of the States embraced in the marketing areas, apparently exerted considerable influence over the definition of the "natural marketing areas".

The operation of the marketing area program was not entirely satisfactory prior to the code. Although the boundaries of the various areas were generally recognized throughout the industry, dumping and

invasion of foreign areas through price cutting were not entirely eliminated..

Following the organization of the Salt Producers' Association in 1914, that organization prepared and published what were known as State Freight Rate Books for every State in the Union. These freight rate books contained the name of every known delivery point, or point of destination, in each State, together with the railroad freight rate to such delivery point from the nearest producing plant. The various producers, in calculating the delivered price of salt to such point of destination, would add to the base price of the figure set forth in the State Freight Rate Book. Thus, every producing plant became a basing point for all delivery points nearer to it then to any other plant.

The following quotation is an excerpt from a letter, written by a member of the industry to a Nebraska wholesale grocer in 1915, explaining the method of using price lists and freight rate books (which system is still in effect):

> "We have sent to you Nebraska and Iowa books and scales. You will note that there are two scales - one Scale No. 7, which applies on Michigan salt, the other Scale No. z-7, which applies on Kansas salt. The Rate Books show freight rates both from Michigan and Kansas. The method of using the books is very simple. Take the town of Weeping Willow, Nebraska, for example. Reference to the Rate Book will show that the cheapest rate to Weeping Willow is from Kansas, and is 36¢. To arrive at the price to Weeping Willow, use the z-7 book and look under column 36, which will show that the price of Number 1 Jack Rabbit is $1.21. This is the price to be charged a retail dealer. From this price you are allowed a 5¢ per barrel commission, as shown on the last page of the Schedule. We insist that the wholesale grocer keep the discount for themselves and shall not in any way rebate to the customer or sell him at prices less than those shown in our schedule.
>
> "To arrive at the price on Michigan Salt to Weeping Willow, we refer to the Michigan Rate, which is 57¢. Recently, however, it has become the practice of Michigan manufacturers to absorb the difference between Michigan and Kansas rates to the extent of 15¢ per barrel. Therefore, the Michigan price to Weeping Willow would be at the rate of 57¢ less the maximum absorption of 15¢, which makes 42¢, and the price of salt from Michigan to Weeping Willow is found in Column 42 of the Michigan Schedule. Thus, the price on Michigan salt is $1.27 per barrel." (36)

The amount of freight absorption varied considerably, depending on the need for an expanded market on the part of manufacturers in any given area, and even varied on different grades of salt. Thus, in 1932, we find one southern manufacturer issuing a price schedule containing

instructions to salesmen to limit freight absorption on rock salt in southern states to a point which would net the producer at least $4.00 per ton at the plant, but permitting complete freight absorption to all points of destination on high grade industrial salt. In sales in Kentucky, for example, the salesman is instructed to figure freight rates on the Michigan or Ohio freight rate, whichever is lower, instead of figuring the freight rate on the actual cost from Louisiana, except that on rock salt the absorption of freight was limited to a figure which would net the producer $4.00 per ton. (15)

3. Open Price System.

For many years, salt has been sold on the basis of published price quotations. Each member of the industry would publish a separate price list for each marketing area into which he desired to sell. Copies of these price lists were circulated among the various members of the Salt Producers' Association. Each company's price list has been in conformity with the price lists issued by other producers for the same areas. All published prices applying to any area were uniform on comparable grades of salt. For example, if a buyer in Peoria, Illinois, wished to buy a carload of common evaporated salt, he would find that the published prices of every salt manufacturer who sold in that area - whether a Kansas, Michigan, Ohio, New York, or Louisiana producer - were precisely the same. Published prices might vary between areas, but not within any area. The prices on rock salt in the Michigan area might be considerably higher than in the Kansas-Michigan, or the Kansas area, but every manufacturer would quote the same price as every other manufacturer for sales in the Michigan area, or the Kansas-Michigan area, or the Kansas area. (15)

There is some evidence to the effect that this uniformity in published prices resulted from a definite fear on the part of smaller producers of disastrous reprisals if they disturbed the prices established by the larger, more powerful producers. The W.R.A. files contain a copy of an excerpt from a letter from the Anthony Salt Company to the Farmers' Elevator Service Company, Ralston, Iowa, written in 1934, stating that the Anthony Salt Company would like to make a certain price reduction, but that this producer had been informed if he lowered his price "they would lower their prices" to a point where he would have to sell below his cost production. (16)

Further evidence as to the reason for uniformity between price lists is contained in the following copy of a letter from the Morton Salt Company, which was apparently sent to members of the Salt Producers Association in 1915 in response to a request that Morton Salt Company or the Association prepare the price lists to be used by the members of the industry:

> "Mr. Crews tells me that it is not advisable for us to furnish schedules in quantities to any one. There is no objection to our sending one or two of our schedules to anybody we want to, but it is improper for us or the Association to furnish price lists for other people. If it is their wish to make their prices

> the same as ours, then it is of course their privilege to do so, but they should have the price lists printed themselves, and it is not within the province of the Association to have them printed for them.
>
> "Our schedules are printed by Barnard & Miller, 172 N. LaSalle Street, Chicago, Illinois, who have the printing all set up, and if anyone wants to order schedules from them and will send a copy of Scale G 15, for example, or any other schedule, showing the printing they want on the outside, the brands, and any other changes they may want, in to Mr. Fred Barnard of the above firm, the order will be promptly filled at a low cost, inasmuch as they have the forms for the schedule all set up and can print them quickly and economically. I would suggest that all members wanting to order schedules should send the order direct to Barnard & Miller themselves." (36)

During the years from 1916 to 1920, several members of the association instructed Barnard and Miller to make up new price lists for them to conform to new Morton Salt Company price lists. (36)

No information is available whether or not this procedure is still employed at the present.

Regardless of the precise procedure which is employed to arrive at price uniformity between the various companies, an examination of a number of price lists in effect in 1932, 1933, and 1934, indicates that prices to the same buyers, on the same or substantially the same grades of salt, in the same marketing areas, are absolutely uniform between salt producers. As there is no evidence to the contrary, it is assumed that Morton is still the price leader in the evaporated salt field, and that International, by reason of its size, probably is the price leader in the rock salt field.

In the period immediately prior to the code, published prices remained stable and uniform, but there was extensive price cutting by means of discounts, rebates and concessions not mentioned in the price lists. The following statement, contained in a letter from the Ohio Salt Company to the N.R.A., early in 1934, bears on this matter:

> "Prior to the time the code became effective, prices on salt to all classes of trade, in our entire field and in all fields, were greatly demoralized. Secret discounts, allowances and brokerage and rebates were made to practically all kinds of resellers....." (17)

Statements made at the time of public hearing on the code, in correspondence between code proponents and the Administration both prior to and after the approval of the code, and by a salt manufacturer recently interviewed by the author of this report, indicates that price cutting took the form of rebates, secret discounts, and other forms of deviation from published prices. It appears that although list prices remained

uniform and stable, they did not represent actual prices during the years immediately prior to the code.

4. Channels of Distribution

According to the Census of Distribution, 15th Census, 1930, salt was sold to the following types of buyers in 1929:

40% to wholesalers or jobbers
25% to retail dealers
33% direct to industrial users
1% through manufacturers' sales brances

These percentages cannot be relied upon to give a true picture of the distribution of salt. First, the figures are based on the dollar value of salt plus value of containers. Since the Census figures indicate a total dollar value of $37,000,000 for 1929, and the U.S.Bureau of Mines states that the total value of all salt produced in 1929 (not including containers) was $25,000,000, it is assumed that a considerable portion of the $12,000,000 difference was attributable to container costs.

The U. S. Tariff Commission study of the salt industry (3) previously cited) indicates that from 1929 to 1933 over 60% of all salt shipments were made in bulk, which would indicate that there was no container cost whatever on 60% of the total salt tonnage. It is probable that large industrial buyers would desire to avoid container costs on shipments to them, and entirely possible that most direct sales to industrial users were made in bulk. Therefore, although direct sales to industrial users may have accounted for only one-third of the total dollar value of salt plus containers, it seems probable that well over half of the total tonnage of salt was sold direct to industrial buyers. This conclusion is further supported by the fact that many grades of industrial salt - particularly rock salt - have a much lower value than higher grades of salt such as table salt.

Thus it appears that less than half of the total salt tonnage carried all of the container cost. This would be particularly true of table salt, packed either in comparatively expensive cartons, or placed in small sacks or packets which in turn are packed in barrels. Table salt was sold through wholesale grocers, and direct to large retailers (chain stores being invluded in this category). Some industrial salt was sold to jobbers, to supply the needs of industrial users incapable of buying sufficient amounts at any one time to make direct sales to them desirable; and some industrial salt was sold to retailers, particularly feed dealers, farm cooperatives, etc. However, it seems probable that a comparatively small percentage of cheaper industrial salt was sold through jobbers and dealers, while practically all table salt was sold to wholesalers and retailers.

In view of the fact that jobbers probably handled a considerably larger proportion of industrial salt than did retailers, it would seem logical that most of the salt sold to retail dealers would be intended for human consumption, while a lesser proportion of that sold to jobbers would have the same use. Then it appears that nearly as much table salt

was sold direct to retailers as was sold through jobbers.

Summarizing the above conclusions, it seems probable that from two-thirds to three-fourths of the total sales of industrial salt were made direct to the industrial buyers; and that of the remaining one-third to one-quarter, the major part was distributed through jobbers, leaving only a small percentage sold through retail dealers. It also seems probable that practically all domestic salt was sold through wholesalers and retailers, and that direct sales of this type of salt to retailers were not very far below sales to wholesalers.

Each of the above named general classes of buyers and distributers were divided into sub-classes. Section II of this chapter contains information on this matter.

In addition to sales made through distributors and those made direct from the plant, some of the larger manufacturers maintain warehouses at various points. Oddly enough, it is not unusual for one salt manufacturer to perform a warehousing service for other manufacturers. For example, the Worcester Salt Company, of New York, sells some of its higher grades of salt in the Middle West. It uses Morton Salt Company warehouses to maintain a stock of salt in that area. Worcester Salt Company salesmen who secure l.c.l. orders, or orders requiring prompt delivery, have the orders filled from the stock of salt carried in Morton's warehouses. (5)

No information has been developed regarding the charges made by Morton for this service. However, aside from any direct payment which may be made, this practice is of advantage to Morton. Worcester Salt Company salesmen may secure an order for a part of a carload of salt of the type which the Worcester Salt Company carries in Morton's warehouses, but the buyer may wish to fill out a carload by buying cheaper grades of salt. It would not be profitable to Worcester to make the shipment from its factory, as the price on the cheaper grades of salt would not be high enough to make possible the necessary freight absorption to the Middle West. So Morton's warehouse is instructed to fill out the order with Morton's salt. Morton does not bill the buyer, as the buyer is the customer of Worcester. Instead, Morton bills the Worcester Salt Company. This is probably the reason why many salt producers buy salt from Morton. (5) Reference is made in this paragraph to Morton's warehousing operations. Whether the same type of operation is conducted by other producers is not definitely known.

It appears that Morton performs this warehousing service for a number of salt producers. As above stated, the terms under which this service is performed are not known, nor is it known whether or not Morton will warehouse only certain grades of salt for other producers, or will warehouse the products of certain producers only, refusing to perform the service for other producers.

I. The Code

A proposed code of fair competition for the Salt Producing Industry was presented to the National Recovery Administration in July, 1933,

and a public hearing thereon was held on August 14, 1933. The trade practice provisions of the proposed code affecting distribution practices and channels did not differ in any material respect from those which were contained in the code approved by the President on September 7, 1933. This became Approved Code No. 20, for the Salt Producing Industry.

A discussion of each of the trade practice provisions of this code affecting distribution practices and channels is contained in Section II of this chapter. As will be observed, there was very little discussion of these various trade practice provisions at the time of public hearing, either as to the reasons for the inclusion in the code of the provisions, or the results sought to be accomplished thereby. In general, the evidence presented at the public hearing was to the effect that the principal trouble in the industry was the demoralization of prices, and that the trade practice provisions of the code were designed to alleviate or cure this condition. Mr. Daniel Peterkin, spokesman on trade practice provisions for the Code Committee, stated:

> "Chief among the abuses in the industry has been the cutting of published list prices - secretly by means of discounts, rebates, concessions of one sort or another, and the dumping of salt by a producer in one field into the field of another producer by extravagant absorption of transportation costs..." (14a)

Mr. Peterkin further stated that on most grades of salt, quality was so well standardized as to eliminate it as one of the factors considered by the buyer in the selection of salt, leaving only price and service as the decisive competitive factors in the industry. (14) For this reason, the elimination of "price demoralization" was of particular importance in the minds of the code proponents.

II. TRADE PRACTICES AFFECTING CHANNELS OF DISTRIBUTION

A. Customer Classification

No provision of the Salt Code directly relates to the classification of customers. Several provisions indirectly, but nevertheless seriously, affect customer classification. The first of these is the requirement that each member shall sell upon the basis of open prices, containing all facts necessary to fully inform the trade of prices and all terms of sale.(18) This requires each manufacturer to openly classify his own customers. Because of the code provision which states that the minimum prices published in any marketing field by any producer in that field shall be the lowest prices at which any producer may sell in that field,(19) uniformity in customer classification is practically assured, since Producer A cannot give a better price to any given purchaser in Producer B's field than Producer B gives to that purchaser. Producer A can call the purchaser anything he chooses, but he must sell to him on the basis of Producer B's classification. The same thing is true of Producer B when he sells in Producer A's field. The natural result is that both manufacturers will classify purchasers alike. This result is made more certain in view of the fact that there is practical uniformity between price lists (both as to price and customer classifications) between all members of the industry within any area.

. . .

Other provisions resulting in customer classification are those prohibiting secret allowances by way of brokerage, and prohibiting rebates or other allowances by any name or of any nature,(20) which were interpreted to mean that brokerage discounts could not be given to others than bona fide food brokers, and were denied to "buying brokers" who were agents or affiliates of buyers. These provisions are discussed at length later under the section entitled "brokerage".

Price schedules in effect prior to and following approval of code define resellers (buyers for resale purposes); consumers (buyers who do not resell); high-grade consumers (buyers of certain kinds of high-grade industrial salt); chain stores (single buyers with one credit risk, centralized control over buying, selling, merchandising and advertising, with wholly-owned subsidiaries); contract consumers (consumers using at least six carloads of salt per year who enter into contract to buy all salt needed for a period of a year).(15)

There is in existence in the Salt Industry a wholesale reseller known as a "salt distributor". These distributors appear to be wholesalers engaged solely, or at least primarily, in the warehousing and wholesale distribution of salt. They differ from other wholesalers or jobbers in that the latter are usually engaged in a more general business, handling other commodities in addition to salt.

A letter from the International Salt Company to the N.R.A., dated February 14, 1934, contains the following statement:

> "Our classification of salt distributors is confined to buyers whose principal business, or at least a substantial part thereof, is the sale and merchandising of salt...." (21)

The Eastern Salt Company, of Boston, Massachusetts, is the distributor for the International Salt Company. This distributor maintains a warehouse and a selling organization, and evidently is able to purchase salt on better terms than other resellers. It is not known whether the Eastern Salt Company is owned by International, or whether it operates under an exclusive agency contract. Not only is the Eastern Salt Company the only distributor for International in the Boston Area, but also it is the distributor, and apparently the only distributor in that area, for each of the other producers in the New York producing field. Evidently, the Eastern Salt Company, although related in some manner to International Salt Company, either by contract or ownership, is also the exclusive distributor for other New York producers.(5)

This situation is not at all unusual. The Atlantic Salt Company, of Boston, is evidently the exclusive distributor in the Boston area for Ohio producers. The Worcester Salt Company has established a distributor in the Philadelphia area, and that distributor handles the salt of other producers as well as that of Worcester. In Washington, D. C., the distributor is an affiliate of or under contract to Morton Salt Company, yet the Washington distributor appears to be the exclusive distributor in this area for other salt producers.(5)

A New York salt producer was asked the following question by the writer: "Why is the Eastern Salt Company the principal distributor in New England for all of the New York producers? Since there is some connection between Eastern and International, won't Eastern try to push International Salt, rather than the salt of other producers?"

In replying, the manufacturer indicated that Eastern performed primarily a warehousing function for the producers other than International, and that he, personally, depended on his own sales force to do a reselling job - to get buyers to order his salt from Eastern.(5)

In an area where this manufacturer owns or controls the distributor, that distributor pushes the resale of his salt, but warehouses the salt of other manufacturers, who do their own reselling activity.(5)

(Writer's comment: In connection with the above, it must be kept in mind that the term "distributor" is used in technical sense throughout the discussion. In other words, although Eastern may be the exclusive "distributor" in the Boston area for all of the New York producers, that does not mean that these producers do not sell salt to other resellers. All of them sell salt to jobbers or dealers, who in turn resell to retailers or consumers. However, the "distributor" is given certain privileges and concessions not given to other resellers, including the privilege of buying salt in bulk, and receiving discounts greater than those given the common, run-of-the-mill reseller.)

There is another type of reseller, evidently different from the "distributor" and the "dealer". This breed is called an "agent" or "supply dealer". As will be discussed later in this report, a restriction was placed upon the sale of bulk salt to resellers during the code period. "Distributors" evidently did not fall within the prohibition,

and neither did "agents or supply dealers." A telegram from the Secretary of the Code Authority to the Deputy Administrator in December 1933, contained the following statement of the policy of the industry:

> "There would be no objection to selling to the complainant (Note: The complainant was a jobber of grain and salt) bulk salt in carloads or less than carloads for consignment direct to its consumer customers, provided complainant would agree not to divert such shipment to its own warehouse for packing and resale, and further that the complainant would agree to be bound by applicable provisions of the Salt Code; in which case the complainant would be classified as an agent or supply dealer and would receive prevailing rates of commission or discount applying to such classification...." (21)

From the above it appears that a dealer or jobber could be classified as an agent or supply dealer, to receive special commission or discount on salt sales made by him, but not warehoused or handled by him, the shipments to be made direct to the consumer. Thus, the jobber or dealer would be acting as a sales agent or broker with respect to the sales so made.

B. Resale Price Maintenance

The following are excerpts from a number of letters written by the Morton Salt Company to various wholesale distributors, between 1915 and 1920:

> "As we explained to you some time ago, the salt market is very firm and it is necessary for the wholesale grocer to assit us in keeping it so...."

> "Open price schedules show the prices charged to retailers. We insist that wholesale grocery companies keep the jobber's discount for themselves, and shall not in any way rebate it to the customer or sell him at lower prices than those shown in our schedule."

> "We are glad to see that you are holding the price, and must ask that you continue to do so as long as you are selling our salt. If the pressure gets too great and you have to blow off steam, please do it with someone else's salt. We should not like to have you selling our goods at lower prices than we quote, ourselves." (36)

Copies of memoranda addressed by the Morton Salt Company to its Sales Department in 1919 indicate that they refused to allow jobbers' discounts to wholesalers who sell to industrial consumers, or who do a brokerage business, or who are owned by or affiliated with retailers. Another memorandum to the Sales Department (1919) reads:

> "You will see from the attached letter that Mr._____ (a jobber) does not believe my statements about a firm market any too strongly, but I hope he will hold to the market. My letter to him gives us a loop hole to cut

him off if he starts cutting prices on our salt." (36)

Following the organization of the Salt Producers' Association in 1914, members of the association discontinued the granting of jobbers' discounts except to wholesale grocers.

It seems probable that one of the purposes, or anticipated results of this action was to enable the members of the association to exert a more effective control over the resale prices of jobbers than would have been possible had they continued to grant discounts to all kinds of jobbers. This conclusion is supported by the following quotation from a letter written by the Secretary of the Trade Association to one of the members of the association in 1915:

> "Immediately the jobbing discount is extended to people other than wholesale grocers listed in the Red Book, there is no measure that can prevent other salt sales institutions from being given the discount, and at once the prices are cut under the schedules, and it cannot be corrected." (36)

As is discussed in Subsection C, Section II, the Federal Trade Commission ordered the members of the association to discontinue discrimination between jobbers, and the members of the association later discontinued trade discounts to all jobbers. Following the approval of the code the members of the industry discontinued bulk shipments to resellers; discontinued the payment of brokerage commissions to buyers or buying agencies. The part played by the Code Authority and the N.R.A. in this action is discussed elsewhere in this report.

Only two instances are found in which the Code Authority made any rulings or took any action directly relating to resale price control. The minutes of a Code Authority meeting on February 6, 1934,(22) contain the following statement:

> "A producer has raised the question with reference to agency contracts, which resulted in the following explanation: The making of an agency contract with any person, corporation or partnership, which could normally by itself compete with more than one salt producer, when such agency contract is made with the intent or having the effect of evading the provisions of the Code of Fair Competition for the Salt Producing Industry by using agency contracts as a means for making prices to buyers which are not published as provided by the Code, or which, in effect, constitute secret discounts, and where the purpose and effect thereof is to procure all or the major portions of the business of such buyers, constitutes a violation of the Code of Fair Competition for the Salt Producing Industry."

The above explanation is one which is worthy of explanation itself, but the intent seems to be that if any member enters into an agency contract with a jobber distributor, whereby he gives such jobber distributor any special discounts not given to other jobbers and not

published in his price lists, such contract distributor must not resell in competition with other manufacturers, at lower prices than those published by the manufacturer with whom he has the contract. As is pointed out in the portion of this report dealing with Restrictions on Size or Manner of Making Shipments, manufacturers will make bulk shipments to distributors who enter into a contract with them not to resell such salt at lower prices than those published by the manufacturer. A major requirement of such agency contracts seems to be the agreement on the part of the distributor, to abide by the resale prices set forth by the manufacturer.

Later, on October 10, 1934, the Trade Practice Complaints Committee minutes contain the following statement: (22)

> "Consideration was given to pending complaints against the Manistee Salt Works, Manistee, Michigan, alleging violations of the provisions of Article IV of the Code, on sales made through their distributor, the Detroit Wayne County Salt Company, Detroit, Michigan, to Abner A. Wolf, Inc., Detroit, Michigan. The Committee rules that if a distributor is representing a producer on an agency basis, the producer is responsible for all acts of the distributor, insofar as they are governed by the provisions of the Code. Therefore, it appears that the Manistee Salt Works has violated the provisions of Article IV, Paragraph (b), (c), (d), and Section 2 of Paragraph (c)."

(The first three paragraphs provide for the filing of prices and the strict adherence to the same. The last paragraph prohibits secret allowances by way of discount, brokerage, storage or advertising. The agency distributor in this case resold salt to Abner A. Wolf, Inc., at a lower net price than was provided by the Manistee Salt Company price lists for sales to retailers.)

Since Salt Manufacturers refuse to give jobbers' discounts or make bulk shipments to anyone except to contract distributors, (as is discussed in Subsection I, Section II) and the above ruling has the effect of requiring resale price maintenance on the part of contract distributors, the effect is to require resale price maintenance on the part of all distributors who receive lower prices than retailers, thus insuring the maintenance of the manufacturers' prices to retailers.

C. Price Differentials

The Code contains no provision directly relating to price differentials or trade discounts. However, the portion of Article IV (a) which prohibits producers from making lower prices (or discounts) than the lowest prices filed by members in any marketing area, has the effect of compelling manufacturers, when selling into any given area, to adopt the same differentials established by producers within that area.

Prior to 1914, it was a customary practice in the Salt Industry to allow price differentials, or "trade discounts" to jobbers. In 1914, the Salt Producers' Association was formed, and as a result of

the operation of that association, it became the practice of its members to allow jobbers' discounts only to wholesale grocers - no price differential being given to other wholesale distributors of salt. In 1922, the Federal Trade Commission issued a cease and desist order, requring the members of the association to refrain from the practice of allowing jobbers' discounts only to wholesale grocers whose names appeared in directories of wholesale grocers or any other similar list prepared by a third person or by members of the Salt Industry in cooperation with each other. The Commission charged that the practice of allowing jobbers' discounts only to wholesale grocers whose names appeared in directories of wholesale grocers was a discriminatory practice, resulting in restraint of trade, and held that the practice of acting in unison in this respect was improper. (11)

The files contain no information indicating the practice of the industry in the years immediately following the issuance of this order. It is presumed that some members of the industry again granted jobbers' discounts to wholesalers other than wholesale grocers, and that other members of the industry tried to discontinue wholesale discounts altogether. By 1933, however, it appears that jobbers' discounts had been eliminated entirely. Price lists and letters contained in the files (15), (17), (23) indicate that trade discounts had been dispensed with prior to the code- at least so far as distributors were concerned. Jobbers could receive no better price than could retailers or consumers purchasing in the same quantities as the jobbers.

Although trade discounts to distributors had been eliminated, price lists of a number of salt producers in effect prior to and following the approval of the code, indicate that certain types of industrial consumers were occasionally given lower prices than were granted to jobbers or other distributors, and that chain stores could secure lower prices than other types of buyers of table salt. As stated in the Customer Classification sub-section of this report, price lists drew a distinction between resellers, consumers, high-grade consumers, contract consumers, and chain stores. These different classes sometimes, although not always, received different prices. Different price lists might or might not be issued to different classes, depending largely on the grades of salt involved. A buyer might at the same time be a consumer and a high grade consumer, depending entirely upon the grade of salt purchased. He would buy his high-grade salt from one price list, and his common salt from another list. On certain grades of salt, resellers and consumers might be quoted the same price; on other grades, the consumer might be given a better price than the reseller. The available price filings are too few in number to permit the telling of a complete story. (15)

The International Salt Company, both before and after the approval of the Salt Code, issued a printed price list, which quoted prices to resellers on a pooled car basis. This company also issued mimeographed instructions to its Field Department, quoting prices to consumers. Following are some excerpts from these instructions:

"The following prices are to consumers only.....Only such buyers will be quoted on the consumer's basis as use in their own process

all the salt they purchase and offer no salt for resale.... To resellers, such as wholesale grocers, feed dealers, etc., our price on these grades of salt will be the printed list prices." (15)

(The printed list prices - i.e., prices to resellers - were higher than prices to consumers for the same grades and quantities.) (15)

"With consumers who use six carloads of salt or more per year, we will contract for their year's requirement of salt. The following prices will apply to such contracts...." (These prices were slightly lower than the consumer prices.)

"No sales will be made at our plant at consumers' prices". (15)

Before the approval of the code, prices were quoted to consumers only on the basis of pooled carloads or straight carloads. No restrictions were set forth on the sale of bulk salt, either to resellers or consumers. No reference was made to l.c.l. shipments, except in the case of high-grade salt. Following the approval of the code, International's instructions provided that bulk salt would not be sold to resellers under any circumstances, nor to consumers in l.c.l. or pooled car lots. Consumers buying less than carload lots or pooled cars must pay the same price as resellers. (15)

Both before and after the code, the statement was made that l.c.l. shipments of high-grade salt would be made, with a minimum shipment of 5 tons. (15)

Before the code, high-grade consumers could receive a special price if they were "national contract buyers, using 2,000 barrels or more per year." Following approval of the code, special discount would be given to contract buyers buying 1000 barrels "from all sources". (15)

Apparently, l.c.l. shipments were made to consumers (other than high-grade) and to resellers prior to the code. Available price lists, usually based on pooled car shipments, with discount for straight carloads, do not indicate the price which would be charged on l.c.l. shipments.

Practically all of the price lists contained in NRA files, issued by various manufacturers, are the price lists to resellers, with a base price for pooled cars, and a discount for straight carloads. The mimeographed instructions issued by International Salt Company, which become, in effect, price quotations to consumers, are the only list prices to consumers contained in the files, so it is not possible to state positively that all manufacturers quoted lower prices to consumers than to resellers. However, since International is the largest producer of industrial salt, and since price lists of all manufacturers to other types of buyers are uniform, it seems probable that other salt manufacturers followed the practice set forth in International's lists to consumers.

The price lists would indicate that all resellers (other than chain stores) were quoted the same prices, whether they were wholesalers, retailers, or cooperatives. Large retailers were eligible to a

special quantity discount on table salt, under conditions which made it impossible for resellers other than national chain stores to secure the discount. Although ostensibly a quantity discount, the conditions under which the discount was granted really made it as much a trade discount as a quantity discount, and for that reason mention is made of the matter in this section. A full discussion thereon will be found in subsection D, "Quantity Discounts".

As set forth in subsection B of Section II, it does not appear to have been the practice to file prices to "agency or contract distributors", and therefore, the fact that price lists do not mention such distributors, does not indicate that "agency distributors" received the same prices as other types of middlemen. On the contrary, it seems probable that "agency or contract distributors" were given price differentials, or discounts, not available to "jobbers", or "dealers."

Although price lists indicate that jobbers, cooperatives and retailers were quoted the same price, (no trade discount being given to jobbers or cooperatives), there is evidence to the effect that concessions in lieu of trade discounts were in existence prior to the code, at least during the depression years, so far as cooperatives are concerned. Some manufacturers granted brokerage commissions to farmers' cooperatives for several years prior to the code. This form of price differential is discussed in detail in subsection G, entitled "Brokerage". Other forms of price concessions are discussed in subsection E. "Discounts other than Quantity Discounts."

From the above facts, it is evident that the Salt Industry, as a whole, had discontinued the granting of trade discounts to jobbers prior to the Salt Code. This practice was not directly affected by the Code, but was fortified by that part of Article IV (a), which states that the "minimum prices published in any marketing field by any producer in that field shall be the lowest prices at which any producer may sell in that field." Thus, if the producers in any given field refuse to grant jobbers' discounts, or other price differentials, producers outside the field must refrain from granting such differentials in sales within the field.

No information is available as to the effect on sales to jobbers as a result of the decision of manufacturers to discontinue discounts to jobbers. Neither is there any information as to what, if any, change was necessitated in the selling practices of manufacturers, as a result of the above action. It is not even possible to state the approximate time when the industry decided to discontinue trade discounts, except that it occurred between 1922 and 1933.

As is set forth in subsection E of Section II of this report, price concessions or reductions in the salt industry usually take the form of additional discounts or rebates, rather than reductions in the published list prices.

For the first year of operation under the Salt Code, published prices were generally adhered to, and there was very little price cutting through special allowances, discounts or rebates not set forth in filed price lists. During the last six months of the code period, there began

to develop flurries of price cutting through secret discounts. As producers began to discover that violations of the price filing provisions of the code were hard to prove, and that punishment therefore was at most uncertain, some of them again commenced to allow secret discounts or other price concessions to certain buyers. Apparently this situation didn't become particularly serious during the code period, but within three months thereafter - by August, 1935 - the practice of granting discounts from published prices became very widespread. At the present time, the Salt Industry is engaged in one of the most vicious price wars in its history - so bad, in fact, that it is said that every member of the salt industry is losing money. (5)

This price war is not reflected in published prices, which remain just about the same as they were during most of the code period. Price cutting takes the form of discounts and allowances from published prices, and most salt producers are now allowing discounts from list price to wholesalers running as high as 30%. (5)

The following circulars, issued by the Worcester Salt Company to its wholesalers, are typical of those being issued by most salt producers:

"September 5, 1935. To Our Wholesalers: Due to the many irregular prices that are being offered to our customers, we have decided for the time being to allow a 20% discount on the delivered prices of all table salt items, both cartons and pockets, up to and including the 50 lb. size. Also on twenty-five (25) and fifty (50) pound bags, Vacuum Fine..."

"September 12, 1935. To The Wholesale Trade: In order to put you in a position to meet competition, we will allow a 20% discount from our delivered price list dated April 18, 1935, on the following items:

Round Cartons Table Salt
Square Cartons Table Salt
Pockets of Table Salt - all sizes
25 lb. and 50 lb. bags table salt
25 lb. and 50 lb. bags V.C.F. salt

....."The Worcester Salt Company has always tried to protect jobbers in a fair margin of profit on the Worcester Brands. We have made no change in that policy. On the new price basis you can now make your resale prices such as will show you as good a profit per unit as ever, and at the same time increase the percentage margin..."

The above letters indicate that the Salt Industry is at present granting to wholesalers a trade discount. Whether or not retailers buying direct from manufacturers are given a comparable discount is not known, but it seems very likely that they are, at least the larger retailers. Neither is it known whether the term "wholesalers" or "wholesale trade", as used by the Worcester Salt Company, embraces only wholesale grocers, or includes other types of salt distributors handling table salt.

A discussion of the reasons and responsibility for the existing price war is contained in subsection E, Section II of this Chapter.

D. Quantity discounts

No provision of the Salt Code mentions quantity discounts, but Article IV (a), mentioned in the first paragraph of subsection C, "Price Differentials", is capable of the same effect on quantity discounts as it is on trade discounts.

For as long a time as there is available information regarding the industry, it appears to have been the practice to allow discounts on carload purchases. Practically all of the price lists in the files (15) are prices to resellers, based on pooled car purchases, with discounts for straight carloads. Casual references appear in some of the price lists to less than carload shipments, but no schedule in the files contains a statement as to the price of salt sold in l.c.l. quantities. It is assumed that a different set of price lists is issued for sales in l.c.l. lots and that the prices on such sales are higher than on pooled car sales. However, no definite information has been secured on this point.

The straight carload discounts from pooled car prices appear to be uniform between manufacturers, but far from uniform between various grades of salt and there is oftentimes a considerable variation between discounts in different market areas. These discounts are set forth in cents per unit of size (cwt., barrel, sack, bale, case, etc.). In the Kansas area a barrel of table salt may carry a pooled car price ranging from $5.27 to $9.12, depending on the freight charge to point of destination. From this price a discount of 40¢ is allowed for carload purchases, making a percentage carload discount of from 4⅓% to 7⅓%. A hundred pound sack of No. 1 Medium, with a price of 75¢ to $1.93, carries a 6¢ carload discount, making a discount of 3% to 8%. Discounts on crushed rock salt range from 4% to 12%; on pressed blocks of 4% to 12%; on square cartons of table salt from 8% to 15%; and on round cartons of table salt a flat discount of 18% seems to be customary.

These discounts may vary from market area to market area, as do pooled car prices, but all manufacturers quote the same prices and discounts within any one area as do all other manufacturers selling in that area. In the Michigan area, the discounts on any given grade of salt may be higher or lower than the Kansas discounts. This practice is not attributable to the code, as the discounts (according to the available price lists) were the same before the code as after its approval.

There is insufficient available information to enable a determination of whether or not the carload discounts to consumers are the same as those to resellers. Since the pooled car base price to consumers is sometimes (if not always) lower than to resellers, it is entirely possible that the carload discount may be different as to different classes of buyers.

The above discussion deals entirely with carload discounts. Other forms of quantity discounts exist in the Salt Industry.

A special committee of the Code Authority, established to investigate the allowance of quantity discounts, in its report to the Code Authority, dated February 7, 1934, and mentioned in the Code Authority minutes of a meeting on March 29, (24) stated

> "It has been the practice of a number of large producers over a long period of years to grant discounts to large quantity buyers... We believe ... that the total business over a period of time, rather than an individual transaction, more adequately establishes the true status of the quantity buyer, in that such a method affords each competitive seller an opportunity to share in the business of the large buyer, whereas if the discount were applied to the quantity purchased at one time from one manufacturer, it might result in excluding competitive sellers from that particular business..."

Subsection C of this chapter, "Price Differentials", has already referred to the fact that International Salt Company allowed special prices to consumers using 6 carloads or more per year, who would contract to purchase their entire annual needs from International. Other companies' price lists indicate that such an offer was not confined to International. This offer did not apply to resellers. Also, International gave a reduced price to "national contract consumers", or "contract consumers" of high grade industrial salt whose annual purchases were 2000 barrels (before the code - 1000 barrels during the code period).

It is not known whether other manufacturers made similar offers on high-grade salt, as the files do not contain high-grade price quotations except by International. Incidentally, it might be of interest to note that the only salt price lists available are those gathered in the Spring of 1934 by the Consumers' Advisory Board, which are included in the Price list Files of the Open Price Unit, Trade Practice Studies Section. The Deputy's files contain a copy of a letter written by him to the Code Authority in July, 1934, requesting a copy of all price lists filed, together with a complete set of minutes of Code Authority meetings. (17) There is nothing to indicate that the Code Authority ever supplied the requested price lists.

These contract buyers must be consumers, not resellers, and they must agree to buy all their salt from the company with whom they enter into the contract, in order to secure the contract price. This practice apparently was not affected materially by the Code.

Another form of quantity discount was given on table salt to a certain type of reseller only. The following quotation is taken direct from instructions issued by the International Salt Company to its Sales Department on December 7, 1933:

> "QUANTITY DISCOUNTS - EASTERN KEY LETTER TERRITORY
>
> "Effective ten days from this date in eastern key letter territory, to a single buyer where there is one credit risk, and where there

is centralized control of buying and selling, and direct control of merchandising and advertising, and to such a buyer's wholly-owned subsidiaries where the payment is guaranteed by the centralized control, who buy salt for resale and whose total purchases of evaporated salt from all sources equal any of the amounts stated below, figured at net plant prices, and considering the blanket price items such as round cans and square cartons, etc., as being the plant price, we will grant the following discounts:

"To such buyers whose respective total purchases of evaporated salt during the last 12 months aggregated any of the amounts mentioned below, we will allow the rates of discount applying as stated below on purchases of table salt only:

$ 25,000	-	2%
50,000	-	3%
75,000	-	4%
100,000	-	5%
150,000	-	7½%
250,000	-	10%

"Every such buyer will be required to certify that he individually purchased such quantity of salt during the past 12 months, unless our own sales records disclose that to have been the case. Should our own records not confirm such fact, then certification of the buyer shall be subject to confirmation through the Secretary of the Salt Producers' Association before any buyer will qualify for such quantity discount, and the usual advance 10 days notice shall be given to the Code Committee before such a discount is made to any buyer.

"We will allow no discount on common salt, blocks, or grades other than table salt. No discount will be allowed on any processing tax on containers.

"Should a buyer falling in any of the categories named above also be a buyer of salt for his own consumption on the Consumer's list Basis, such as baker's salt or butter salt, etc., the quantity discount shall not apply on such grades, and he may purchase such salt on contract or on such terms or for such periods as apply in the territory where the salt is purchased.

"In all other territories except the Pacific Coast territory, West of the Rocky Mountains, and except the State of Texas where no quantity discounts will apply, the quantity discount in effect will be 10% of the net plant price on table salt only to buyers whose aggregate salt purchases amounted to $100,000 or more during the past twelve months; subject, however, to like qualifications, terms and conditions as set forth in the first paragraph of this memorandum." (15)

Four significant points should be noted. First, that table salt only is affected; second, that the phraseology of the offer would seem to restrict it to corporate chains, excluding voluntary chains; third

that the flexible scale of discounts applies only to the Eastern territory, and that a flat 10% discount for $100,000 purchases applies in all other territories except Texas and Pacific Coast areas; fourth, that the buyer need not purchase all of his salt from International, but may purchase part from other sources.

The files do not contain similar offers from other companies, but it is known that other members of the industry followed the same practice as International.

The first reference in the files to the matter is a copy of Association Bulletin No. 6, October 21, 1933, informing Association members "that First National Stores, Great Atlantic and Pacific, Kroger, National Tea Company, and Western States Grocery Company have qualified for discounts applying to purchases of $100,000 or more per year.

The report of the special committee of the Code Authority investigating quantity discounts, dated February 7, 1934, indicates that two additional chains - Safeway Stores and American Stores - had qualified as buyers of over $100,000. (24)

From the phraseology of the above quoted association bulletin, and statements contained in some of the complaints hereinafter mentioned, it seems probable that this discount to chains had not been of long standing, probably having been commenced in the early Fall of 1933 - around the time of the approval of the Code, although there is nothing to show that the Code was responsible. This conclusion is supported by the following complaint, dated November 4, 1933, from the National American Wholesale Grocers' Association to the Secretary of the Salt Producers' Association:

> "I am informed that after the approval of the Code for the Salt Producing Industry an agreement was made among salt manufacturers with respect to quantity discounts, among other things, as follows: 'To a single buyer where there is centralized control of buying and selling and direct control of merchandising and advertising, and to such buyer's wholly owned subsidiary, where the payment is guaranteed by the centralized control, and whose annual purchases of salt for resale from all sources amount to $100,000., Figured at the net plant prices, a discount will be allowed on table grade only and 10 percent on a net plant price.'
>
> "You will readily recognize that if this quantity discount proposal is adopted and adhered to by the salt manufacturers, a few of the nation-wide chain store organizations will be in the position to resell salt at a price less than that for which it can be bought by the wholesale grocer from the producer. The adoption of this quantity discount schedule by agreement among the salt manufacturers will discriminate against the independent wholesaler and retailer, and will tend to drive them out of the field of

Apparently there was a considerable divergence of opinion among the members of the industry as to the desirability of the above quantity discount, and the Code Authority established two special committees to study the question - one composed of members favoring the practice, and the other of members opposed thereto. The files contain a copy of the report of the Special Committee favoring these quantity discounts, a portion of which has already been quoted. This report further stated that the saving in selling cost alone to the large buyers was greater than the discount being given to them. The report continues:

> "The report of the Committee opposing quantity discounts sets forth a number of meritorious arguments why granting discounts should not be allowed, and while we recognize many reasons why it should be desirable to discontinue all discounts or differentials on quantity buying to the retail trade, and have given full weight to the attitude of buyers whose purchases are not of sufficient volume to entitle them to the benefit of such discounts, we believe at this time (their discontinuance) would be unwise and would constitute a hardship on such manufacturers in our industry who for many years have enjoyed a large share of the business of these quantity buyers and are dependent on their business to a large extent for the efficient operation of their plant."(24)

The files do not contain any copy of summary of the report of the Special Committee opposed to quantity discounts. Apparently its arguments were cogent, for on March 29, 1934, the Code Authority, by a vote of 4 to 3, rejected a resolution approving these quantity discounts, and on the same day, by a vote of 4 to 3, adopted a resolution recommending that the practice of granting quantity discounts, other than the usual carload discounts, to retail buyers be discontinued. A portion of this resolution reads as follows:

> "Marketing provisions of the Code provide that each producer in each field of production shall individually publish to the trade and

to the Code Committee the prices at which he will sell. Should the Code Committee find the prices in any field unreasonably high, it may require them to be reduced to a reasonable figure, and this might be further construed to give the Code Committee the power to require the elimination of discounts found to be unreasonable or economically unsound.....Such discounts may result in discrimination as between buyers conducting similar businesses and marketing similar grades of salt.

"The report of the Special Committee opposed to the granting of discounts does, in the opinion of the Code Committee, set forth such facts in support of their recommendation that the Code Committee feels justified in recommending the elimination of quantity discounts to retail buyers". (24)

On May 5, 1934, the Secretary of the Code Authority replied to a letter from the Deputy Administrator (transmitting a complaint from a wholesale grocer regarding these quantity discounts), referring to the above mentioned action of the Code Authority and stating:

"The Code Committee is awaiting the Deputy's advice as to what further steps should be taken in connection with this matter."(24)

For some undisclosed reason, the Code Authority then decided to reverse its previous action, and on May 9, 1934, the minutes of a Code Authority meeting read as follows:

"The Code Committee gave further consideration to the subject of quantity discounts and after a careful examination of all facts found a divided opinion in the industry on the question of quantity discounts. Pricing salt at which it will be sold has always been an individual matter for each producer and this is recognized in the Code. The Code does not provide for the Code Committee to make or fix prices at which producers in the industry shall sell salt, above cost." (22)

Whether this latter action was taken upon advice from the NRA, or because of internal pressure within the Salt Industry, is not known.

The files contain a number of complaints from buyers---mostly from wholesale grocers, but one from a small chain store---complaining of the price discrimination resulting from this type of quantity discount. (24), (25). Possibly as a result of protests from smaller retailers, there was a revision made in the scale of quantity discounts during the summer of 1934. On September 24, 1934, a letter was written by the International Salt Company to the Secretary of the Code Authority(24) stating in part:

"Following is a statement of quantity discounts on evaporated salt now in effect with resellers, as published by individual producers in the New York field:

$25,000	to $50,000	- 5%
50,000	to $75,000	- 6%
75,000	to 100,000	- 7%
100,000	to 150,000	- 8%
150,000	and over	- 10%

It will be observed that the discount of 10% has been changed to apply on $150,000 instead of $250,000, and that discounts on smaller purchases had been proportionately raised. This evidently afforded some releif to purchasers buying quantities between $25,000 and $150,000.

In response to a complaint from a California wholesaler in December, 1934, the Code Authority in March, 1935, disclaimed all responsibility or control over the subject of quantity discounts, and on March 22,1935, the Deputy Administrator notified the complainant that the case was considered closed, this action having been recommended by the Code Authority, the Administration representative on the Code Authority, the Industrial Advisory Board and the Legal Adviser. (26)

The Committee opposed to quantity discounts was composed of representatives of the Carey Salt Company, Myles Salt Company, Watkins Salt Company, and the Colonial Salt Company - all medium sized or small manufacturers. (22) The companies represented on the committee favoring quantity discounts were not disclosed. Neither does the record disclose which members of the Code Authority voted in favor of quantity discounts or against them. All that is known definitely is that two members of the Code Authority, W. F. Ince, of the Colonial Salt Company, and Howard Carey, of the Carey Salt Company, had indicated opposition to the quantity discount practice. (24) The remaining five members of the Code Authority were officials of International, Morton, Ohio Salt, Jefferson Island Salt, and Leslie-California Salt Companies. (22) Of these five, Jefferson Island and Leslie-California are comparatively small producers, in addition to being non-association members. It is possible that these two may have been the additional two voting against quantity discounts.

Mr. Carey, of the Carey Salt Company, addressed a letter to the N. R. A. on February 18, 1934, opposing quantity discounts, in which he stated in part:

"Through the granting of these quantity discounts, the salt industry is guilty of fostering one class of buyers as compared with another, with the probable result that more and more of the tonnage will move through the outlet receiving the lower price. This is not a desirable thing economically, because it not only works for the exclusion of distributive outlets but to the exclusion of producers as well. This is very definitely recognized in rulings of the courts and Interstate Commerce Commission....If discounts are allowed to chain retail stores and cooperative buying groups one only has to contemplate the ultimate outcome; namely, all salt will be handled by such buyers. These buyers would concentrate their purchases with two or three salt companies, and thus the distribution of one of the necessities of life would be under the control of a few..." (24)

On March 18, 1934, the Detroit Wayne County Salt Company (distributors for the Manistee Salt Works - a small producer), wrote to the N. R. A. complaining about these quantity discounts, stating in part:

"I have discovered that the large salt manufacturers (in the Michigan field), namely, Morton Salt Company and Mulkey Salt Company, allow a secret discount of 5% for a certain volume of business, and 10% for a larger volume. In other words, the large manufacturers have got to the largest buyers and have them completely sewed up tight"(25)

On September 5, 1934, the Colonial Salt Company, of Ohio (one of the smaller producers), protesting against the continuance of these quantity discounts, illustrating the ability of Kroger Grocery Company to advertise a price on salt to housewives which is practically the same as the best price which can be secured by an independent wholesale grocer, stated:

"You will see from the above that it has put the wholesale grocer and the independent retail grocer out of business so far as the sale of salt is concerned." (24)

(Should the above statement be correct, this result would, of course, reflect adversely on those manufacturers depending on independent wholesale and retail grocers to distribute their product.)

As above indicated, no code provision seems responsible for the development of the quantity discount to chains; neither was the Code so administered as to prevent such quantity discounts.

According to information secured from a New York salt producer, the quantity discount given to chain stores is the New England marketing area was reduced to a maximum discount of 3% in the latter days of the code period. Moreover, this manufacturer stated that this discount was given to any retail buyer whose annual perchases were large enough to entitle him to the discount - not only to national chains, but also to local chains, cooperatives, and independent stores.(5) It is not known whether this downward revision in the maximum discount was accompanied by any change in the quantity of salt which must be purchased to entitle the buyer to the discount. If the buyer must purchase $150,000 worth of salt annually in order to secure the 3% discount, it does not seem likely that the smaller chains or cooperatives could avail themselves of the concession, and that it would be applicable to very few independent buyers.

This salt producer also indicated that chains were not permitted to use the special quantity discount to lower their prices on table salt to the consumer. He stated that the chain stores maintained a suggested minimum retail price, thus permitting independent grocery stores to sell the salt at the same price as the chains.(5) Whether this practice was pursued by all salt producers selling in the New England Marketing Area, or only by this particular manufacturer, is not known.

It is still the practice to allow a 10% discount to chain stores in marketing areas other than New England.(5)

Section E. Discounts Other Than Quantity Or Trade

According to statements made at the public hearing(14) and in a letter to the N.R.A. from the Ohio Salt Company, Akron, Ohio,(17) during depression years the marketing practices of the Salt Industry became somewhat demoralized, and various companies in a scramble for volume granted discounts, rebates, advertising allowances, and other forms of price concessions not mentioned in their price lists.

Accordingly, a number of provisions were included in the Code, (in Article IV, Section e) prohibiting such practices as the secret granting of rebates, advertising allowances, brokerage and other commissions; substitution of grades different than those ordered; warehousing of salt with customers; gratuities, free deals.

Except as discussed under the "brokerage" and "consignment sections of this report, the files disclose nothing to show that these provisions had any effect whatever, there being no mention of them either by producers, the Code Authority, or buyers.

In addition to these code provisions, there developed during the code period a striking uniformity in the "marketing provisions" sections of price schedules, whereby practically all price schedules contained a statement of uniform credit terms; refusal to accept bookings for longer than thirty days; and a statement that price protection would not be extended for more than ten days after shipment.(15)

No information has been develped as to the practices of the Industry prior to the Code on the above subject, nor the effect of any change in such practices under the code.

As has been stated in Section II, subsection C of this chapter, price cutting in the salt industry usually takes the form of allowances, rebates, discounts, and other forms of concessions from published price lists. The industry is engaged in a severe price war at the present time, in which discounts running as high as 30% are granted from list prices. In addition to the discounts given to certain classes of buyers - such as the 20% discount given to wholesalers of table salt by the Worcester Salt Company - special discounts and allowances are made to individual buyers, depending on their bargaining power and importance. Published prices appear to be used only as a basis from which to begin the calculation of discounts. The Industry has reverted to the practice existing before the code, of granting a large enough discount from list price to secure the buyer's order.(5)

The present condition, although not becoming really serious until about August, 1935, had its fore-runner in the last six months of the code period. There was spasmodic, spotty price cutting during that time, increasing along toward the end of the code.(5)

It is difficult to assign responsibility for the price war to any particular class or size of producer. The code prohibited secret allowances by way of discount, brokerage, storage, or advertising, storage of salt in customers' warehouses, and the offering of salable gifts or

prizes. Apparently these provisions did not affect the merchandising program carried on under the code by one of the largest producers.

Salesmen of this producer would approach wholesale grocers or other salt wholesalers, offering to place a few cases of his salt in the wholesaler's stock. No request was made of the wholesaler that he push this particular brand of salt, or that he discontinue the handling of other brands which he might be carrying. The wholesaler was told that retailers in his locality would soon begin to ask for this particular producer's salt, and he might as well have it on hand so that he could fill the orders. The salesmen would then distribute to school children and housewives, through retailers or by a house to house program, pencils or toy balloons or other similar novelties, bearing the name of the salt producing company. This form of advertising, together with magazine and newspaper advertising, would develop a consumer demand for the salt in the locality where the campaign was being conducted. Retailers would begin to ask their wholesalers for a few cartons or cases of this salt. Since prices were uniform between various manufacturers, it was just as profitable for the wholesalers and retailers to handle one grade of salt as another, and they naturally gravitated toward the salt for which there was the greatest consumer acceptance - the advertised brand.(5)

Smaller producers, seeing their customers slowly weaned away by this process, were confronted with the alternative of conducting an expensive advertising program of their own, or reducing their prices to make their product a more attractive one to handle. Rather than reduce list prices, they resorted to special discounts from list prices to those customers on whom they had formerly relied most heavily. Thus was started the price war now in existence. The fault cannot be said to lie either with the large or the smaller producers, but rather with a program which resulted in uniformity of published prices, without allowing any differential or price advantage to the non-advertising, usually smaller, concerns.(5)

F. Consignments

The Salt Code contains provisions as follows:

Article IV (e)

"The following shall be deemed to be unfair trade practices in this industry:

"2. Secret allowances by way of ... storage.

"5. Delayed billings.

"7. Storage of salt in customers' warehouses."

Although there was very little discussion of the above provisions at the time of public hearing, Mr. Daniel Peterkin, of the Morton Salt Company, stated that these provisions were intended to prohibit the consignment of salt to customers.(28)

In the Spring of 1934, the Code Authority ruled:

"Consignments are prohibited unless all purchasers can buy on consignment." (17)

There was little code activity on this subject. Apparently the shipping of salt to branch warehouses of manufacturers, and agency distributors was not considered as consignment. Evidently, the placing of table salt in the stock of a wholesaler (described in the previous subsection) was not considered to be a violation of the code.

Practically nothing is known of the extent to which manufacturers consigned to buyers prior to or since the code nor the extent to which salt was stored in buyers' warehouses.

G. Brokerage

The Salt Code contains three provisions which are related to the subject of prohibition of the payment of brokerage commissions to buyers or buying agencies.

Article IV, Section (3), Paragraph 2 prohibits "secret allowances by way of discount, brokerage, storage, or advertising." Paragraph 6 of this section prohibits "rebates or other similar allowances by any name or of any nature." Paragraph 16 of this section prohibits the "giving of gratuities or special commissions to buyers."

At the time of the public hearing on the Salt Code, there was practically no discussion of any of these provisions, other than a general statement that the industry was suffering because of the use of rebates, allowances, commissions, and other price concessions to certain buyers not set forth in published price schedules. (14a) There was no specific mention of any desire to prohibit brokerage payments to buyers or agents of buyers, the intention appearing to be to prohibit all allowances or concessions not specifically set forth in open price lists.

According to the U. S. Bureau of the Census, approximately 5% of the production of the Salt Industry was sold through brokers in 1929. (29) For a considerable period of time prior to 1929, the members of the Salt Producers' Association had endeavored to strictly regulate brokerage allowances.

In 1919, the Secretary of the Trade Association addressed a communication to all members of the Association, containing the following statement:

"Mr. _____, of _____, South Carolina, styles himself a broker and has been known as such for some time, but is now without a salt account due to the fact that it has been discovered that he is vice president of the _____ Wholesale Grocery Company." (36)

On September 30, 1919, the Secretary of the Association wrote to one of the members of the association, as follows:

"Will you please furnish me with a list of the brokers through whom you are selling salt? The last list you sent us is over a year old. We find that almost every salt company employing brokers requires an agreement with them that they will represent him exclusively, but many brokers are still endeavoring to represent as many salt producers as they can sign up and keep under cover." (36)

The salt producer replied a few days later, supplying an up-to-date list of its brokers, and stating that they would promptly advise the association secretary if any changes in the list occurred. (36)

In 1916, the Secretary of the Association addressed a letter to another association member, as follows:

> "This will acknowledge receipt of your letter of July 13, referring to the amount of brokerage allowed to brokers on your list. This is certainly some stunner. It doesn't surprise me at all that you have had trouble in your territory. The most brokerage paid in any territory in which the association operates at present is 20¢ per ton on common salt and 35¢ per ton on table salt. The 20¢ per ton on common is varied only when the brokerage is made 3¢ per barrel. If every broker representing Kansas concerns, at the brokerage they are getting, is not splitting it, I shall be surprised - all of which acts against your market every second." (36)

A similar letter was sent by the Secretary of the Association to still another salt producer about the same time:

> "It is easy to see why you have no market. When brokers are permitted as high as 10¢ per barrel on common and 20¢ per barrel on table, it means that in order to get business, they can reduce the market price 8¢ on common and 15¢ on table, and still get the regular margin allowed the brokers." (36)

The above correspondence indicates that the Trade Association for many years had endeavored to limit the amount of brokerage commission; discontinue the giving of brokerage to buyers or agencies or affiliates of buyers; and to recognize as brokers only those who were acting as the exclusive agent of one manufacturer.

However successful this program may have been prior to 1930, it appears to have broken down during the depression years. The following statement contained in a letter from the Ohio Salt Company to the Administration is enlightening:

> "Prior to the time the code became effective, prices on salt to all classes of trade, in our entire field and in fact in all fields, were greatly demoralized. Secret discounts, allowances and brokerage and rebates were made to practically all kinds of resellers. During this time we would allow discounts to farmers' cooperatives and to other jobbers. Since the code became effective, all of these discounts have been eliminated." (17)

Letters in the NRA files from the Ohio Farmers Grain and Supply Company, the Farmers' Union State Exchange, the Ohio Equity Exchange (all of Ohio); Farmers' Cooperative Exchange (of North Carolina); and the Farmers' Elevator Service Company (of Iowa) - all of which are farmers' cooperatives - state that before the code they were allowed a brokerage commission. (23)

Contained in correspondence from the Farmers' Elevator Service, of Ralston, Iowa, are a number of statements to the effect that national chain stores had been allowed brokerage payments, and casual statements in other letters indicate that brokerage payments had been made to buying agents for various types of group buying organizations - including retail cooperatives, wholesaler-retailer cooperatives (such as I.G.A., Red & White, Clover Farms, etc.) (16)

There is some evidence to support the belief that the growth in the payment of brokerage commissions to buying agencies may have been caused by, or at least encouraged by the fact that jobbers' discounts, as such, had been largely eliminated through the activity of the Trade Association. Instead of giving cooperatives a jobbers' discount, a comparable discount entitled "brokerage" had been given. As evidence, correspondence from farmers' cooperatives refers to jobbers' discounts and brokerage as though they meant the same thing.

The Farmers' Elevator Service Company stated:

"This southern salt producer is not allowed to pay us brokerage or allow us the usual jobbers' discount (not carload discount."

"We are going to get the right to be paid commissions for selling salt or others will not receive them. Cooperatives will get discounts or chain stores will not."(16)

The Ohio Equity Exchange stated:

"Monopoly on salt is preventing us from handling salt on a jobbers' basis, and elevators are losing their salt business to chain stores."

"It seems a peculiar thing that after we have handled a commodity for years on a jobbers basis, that on account of the code they tell us they cannot work with us any more."

"Before the Salt Code, we had no difficulty in securing brokerage, but since the code we are told that we cannot any longer receive it. If other brokers and wholesalers are given brokerage and such commissions are not given to us, we cooperatives are being discriminated against."

"We respectfully request that a ruling should be made permitting salt companies to grant brokerage to any legitimate cooperative wholesaler."(23)

Whatever the reasons responsible for the practice of paying brokerage to buying agencies, the Code Authority decided to eliminate the practice.

Within a month after the approval of the Salt Code, the Code Committee (at a meeting on October 10, 1933), defined a broker as follows:

> "A food broker or merchandise broker is an independent sales agent who performs the service of negotiating the sale of food, groceries, or other merchandise for and on account of the seller as principal, and who is not employed or established by or affiliated with the purchaser or any purchasing agency, directly or indirectly, and whose compensation is a commission or brokerage paid by the seller."(22)

The Code Authority discovered that the above definition did not have the effect of prohibiting brokerage payments to buying agencies, and on February 6, 1934, the Code Authority made the following explanation:

> "Any producer of salt selling directly or indirectly to a broker who does not qualify under the definition of a 'broker' as adopted by the code committees on October 10, 1933, is violating the provisions of the code." (22)

(The Code Committee did not specify which provision, or provisions, of the code would be violated by such brokerage payment.)

It was the above regulation which gave rise to the protests from farmers' cooperatives. So far as the NRA files disclose, no protests or objections to the above regulation were received from any distributor other than farmers' cooperatives. Whether this means that the regulation was applied only to farmers' cooperatives, and ignored with respect to other types of distributors, is not known. The only definite evidence on this point is the fact that prior to June, 1934, the Jefferson Island Salt Company refused to give brokerage to a farmers' cooperative, stating that it could not do so without violating the Code Authority ruling; yet during the month of June, 1934, the same salt producer issued the following notice to Jobber Buying Organizations:

> "To jobber buying organizations we are allowing a brokerage of 5% to the net plant price. The above brokerage is to be paid to the buying organizations direct. The buying organizations which we recognize at this time as being entitled to the brokerage, are as follows.
>
> Clover Farms; I.G.A.; Jobbers' Service; Manufacturer-Jobbers' Association; Merchants Service; Flee-Zing; Red & White; Nation-Wide; Wholesale Grocers' Exchange; United Buyers; National Branch Stores." (23)

(The majority of the above organizations appear to be voluntary wholesaler-retailer cooperatives.)

Whether the above offer was subsequently rescinded by the Jefferson Island Salt Company, or whether that company continued to grant brokerage to such buying organizations while denying it to farmers' cooperatives, is not known. Although this offer was brought to the attention of the Secretary of the Code Authority by one of the farmers' cooperatives, there is no indication that anything was done about it. (23)

In this connection, it is pertinent to remark that farmers' cooperatives had long been persona non grata with at least one large member of the salt industry. This is indicated by the following excerpt from a letter addressed by a large salt producer to its sales office in 1915:

> "We notice on your report of April 26 that you sold a car of assorted salt to the Farmers' Cooperative of _____and _____, Iowa. We wish to state that when you receive orders from this class of trade at Iowa points you should take it up with us first. These people are evidently farmers. It is our policy not to sell farmers in towns where we are securing business from merchants. We have been selling merchants in both of these towns for years and feel sure there will be trouble if a car of our salt is unloaded by the farmers at these points."(36)

On April 30, the sales office replied:

> "Yours of the 28th was apprently written under a false impression. We have not sold the Farmers' Cooperative Association of _____and _____, Iowa. We have, however, quoted them, and the quotation is 15¢ high on the scale, which is our regular system of handling these farmers' associations. We have as yet received no order. Should one come in, we shall of course advise you, and expect that the overage in price will be sent to the dealers in the towns." (36)

One of the first complaints received against the discontinuance of brokerage payments to cooperatives came from the Farmers Union State Exchange, of Ohio, who addressed a letter to the Administration in December, 1933, as follows:

> "We are a central cooperative wholesale organization serving over 400 local cooperative stores, elevators, oil associations, etc. Many of these local cooperatives purchase salt from us in carload lots, shipped from the salt plants direct to them and billed to us. We have been advised by the Salt Companies that under the code they are not permitted to allow us any brokerage on this business." (23)

This complaint was referred to the Secretary of the Code Authority, who disclaimed responsibility for the refusal to allow brokerage to cooperatives, stating:

> "I do not believe the above situation is affected by the Code." (23)

He stated that the salt producers serving the Ohio Territory maintain a regular sales force and do not need additional representation through the medium of the Exchange.

> "To allow a discount or brokerage for services which the producer does not need would be discriminating against other customers." (23)

On subsequent complaints from other cooperatives (even those received after the Code Authority explanation that the payment of brokerage to cooperatives would be a violation of the code), the Secretary of the Code Authority made much the same reply, indicating that the matter was not affected by the code. (16) (23) In this connection, the following correspondence is of interest. On May 23, 1934, the Jefferson Island Salt Company addressed the Secretary of the Code Authority:

> "I have your letter of May 19, enclosing a copy of a letter from E. L. Kreger of the Farmers' Elevator Service Company, Ralston, Iowa, in which he asked you the direct question of whether a producer would be allowed to pay him brokerage on business he developed through his company; also a copy of your letter to him of May 17 in which you advised that the Code Authority does not deny anyone the right to act as a broker for any salt producer. Needless to say, I am very much surprised to see the statement contained in your letter to him. I had understood repeatedly that he, on account of the very nature of his business, could not comply as a legitimate broker under the salt code. I trust you will immediately let me have an answer also to this direct question - is the Jefferson Island Salt Company at liberty to appoint the Farmers' Elevator Service Company of Ralston, Iowa, as a broker for business of elevator companies which are members of this Service Company?" (16)

On May 24, 1934, the Secretary of the Code Authority replied to the above letter, referring to the fact that the Code Committee had defined a broker on October 10, 1933, and adding:

> "Considering the knowledge I have of the operation of the Farmers' Elevator Service Company, -- it is not, in my judgment, a broker nor does it conduct it business so as to come anywhere near qualifying within the definition of a broker, as adopted by the Code Committee.

"Under the circumstances, to appoint this company as a broker would be contrary to the qualifications of a broker as contained in the definitio, and therefore, I do not see how you can consistently grant this company's request for recognition as broker without violating the code." (16)

On July 11, 1934, the Code Authority adopted an interpretation of Article IV, Section (3) 6, reading "Rebates or other similar allowances by any name or any nature", to the effect that such provision prohibited the employment of any agent or broker when all or a portion of the commission paid to such broker is passed on to the customer. At the same time, the Code Authority defined brokerage as meaning the compensation paid by a producer to an independent sales agent for services in negotiating the sale of salt, no part or portion of which compensation is passed on to the customer or purchaser. (22)

During the Summer of 1934, the Salt Producers' Trade Association approved a new "brokers contract for use by its members, which provided that salt sold through a broker is to be shipped and billed direct to the buyer by the salt producer; that the broker agrees to keep the entire brokerage commission paid to him, and that no portion thereof will be rebated, returned, transmitted, or in any other way paid to the buyer, and that no portion thereof shall be used in any way that would result in giving the buyer a lower price than he would receive if he purchased salt direct from the seller. (16)

On December 15, 1934, the N.R.A. issued official interpretation of Article IV, Section (e) 6, which prohibited "rebates or other similar allowances by any name or of any nature". The interpretation was to the effect that the above words prohibited the giving of brokerage when such brokerage is given to a purchaser. The interpretation reads:

"Brokerage cannot be given to a purchaser, since it is payment made to a full or part time agent in return for a definite service or function performed." (30)

This interpretation (which was assented to by all Advisory Boards of the N.R.A.) like those previously issued by the Code Authority makes no mention whatever of the President's Executive Orders 6355 and 6606, and N.R.A. interpretations thereof, contained in Administrative Orders X-35 and X-93. The last named Administrative Order stated:

"Pursuant to Executive Order 6306-A; dated February 17, 1934, no provision of any Code of Fair Competition heretofore or hereafter approved under said title of said act, shall be so construed or applied as to make it a violation of any such code for any member of any industry to pay or allow a brokerage commission to any bona fide and legitimate cooperative organization performing services or engaged in functions for which other persons may properly be paid such a commission....."

Because of a bitter fight waged by farmers' cooperatives - particularly by the Farmers' Elevator Service Company, of Ralston, Iowa- to have the above mentioned Executive Orders carried into effect so far as the Salt Code was concerned, the regulations issued by the Code Authority denying brokerage to cooperatives obviously could not be upheld in any test case. Therefore, in the Spring of 1934, the files disclose the growth of new means of preventing brokerage payments to cooperatives.

On May 25, 1934, the Anthony Salt Company, Anthony, Kansas, (a comparatively small producer), addressed the following letter to a farmers' cooperative:

> "I hope you can be patient forjust one more month. Although I am not a liberty to tell you just what is going to happen, I do know that by that time we will have all our difficulties straightened out....
>
> "It is true that the Code Authority does not now deny anyone the right to act as a broker for any salt producer, but it might be of interest to you to know that when we tried to do this, we were served notice by other people that in the event we did it, all the other companies would allow exactly the same brokerage to all their independent buyers, and they also threatened that in the event we met this price, and allowed you a brokerage off that, they would come on down on their scale price until they would have us whipped to the point that we would be selling below our cost of production....." (31)

From this letter it will be observed that certain members of the Salt Industry were afraid of what would happen to them should they quote prices not agreeable to other members of the industry. (Incidentally, a letter from Mr. E. L. Kreger, Farmers' Elevator Service Company, Ralston, Iowa, dated April 24, 1935, stated that the Anthony Salt Company went out of business about the first of April of this year. "We do not know what became of them, but if it is the usual story, they have been absorbed by the one company that controls the field." (31) Whether this fact, if true, has any connection with the fear of reprisal which the Anthony Salt Company labored under a few months previously, is not known.)

. . .

In the Spring of 1935, Mr. Kreger received notice from the N.R.A. to the effect that no provision of the Salt Code could be interpreted to prohibit the payment of brokerage to bona fide cooperatives. On April 25, 1935, Mr. Kreger replied, stating that he appreciated this fact, but adding that it didn't help him any. "The Code gives the producers in the Michigan-Kansas field the control of this territory, and Michigan-Kansas producers will not recognize us, and claim that under the code neither Jefferson Island or any other'outside' producer can file us as jobbers until a Kansas or Michigan producer does so...." (31)

Supporting this statement is a letter written to Mr. Kreger by the Jefferson Island Salt Company (a Louisiana producer), stating:

> "The northern producers have our hands tied absolutely, and I hope you will understand our position. For your own information, I am fairly positive that all buying organizations of your kind will be done away with. Frankly, I cannot see how they can make an exception of your case, but each producing area makes its own rulings, and I can assure you that whenever we are permitted to put you on our price list, we shall certainly do so." (16)

Mr. Kreger went on to state that since the code prevented "outside producers" from granting brokerage to his organization, and since the dominant members of the Kansas and Michigan fields had prevented other producers in those fields from granting brokerage to him, by threats of reprisal, he was as effectively prevented from securing brokerage commissions as if the President's Executive Orders regarding brokerage had never been issued. (31)

Mr. Kreger's statement is partially substantiated by a letter from the Secretary of the Code Authority to him, replying to Mr. Kreger's charge that Kansas and Michigan producers refused to allow him brokerage, or to permit outside producers to allow him brokerage. The Secretary's letter reads:

> "You state that the southern salt producer is not allowed to pay you brokerage or allow you the usual jobbers discount (not carload discount) because the Kansas and Michigan producers will not allow it to you. We are informed by both Michigan and Kansas producers that their price to you on all grades of salt is exactly the same as it is to any other carload buyer or jobber, and that you enjoy the same discounts as any other carload buyer or jobber.
>
> "It would appear that if any special discount was granted to you, it would consitute a discrimination as against every other carload buyer and jobber in the territory in which you operate."(16)

(It is difficult to reconcile the above statement with the action taken by the Code Authority on the subject of quantity discounts to chain stores, heretofore discussed. In connection with the above letter, it should be kept in mind that jobbers and retailers were given the same price, and that no trade discount or brokerage was given to any resale buyers. Thus the above letter confirms Mr. Kreger's statement that the code had resulted in denying to him brokerage payments which he had received prior to the code.)

Several farmers' cooperatives complained that the discontinuance of brokerage payments to them as a result of the code had caused them to lose practically all of their salt business. (23) Mr. Kreger is more specific, stating that his salt business was reduced from $4200 to $700 (not indicating whether these figures represent gross business or net

profit); and that moreover, because of the brokerage ruling, one salt producer who owed him $2000 in back brokerage commissions stated that he couldn't pay that amount, because it would be a violation of the code. (16, (23), (31).

There is little information available with respect to the effect on prices of the refusal to grant brokerage commissions to cooperatives. Mr. Kreger stated that prior to the discontinuance of the brokerage to him, members of his organization were able to secure Kansas rock salt at two dollars per ton. Following the discontinuance of brokerage, the price was raised to $3.00. "Then we gave up our fight, and informed our trade, and soon the price of salt had advanced to $5.00. Our members had been able to buy it in bulk, but then orders were given that there would be no more bulk shipped, so the dealer has to pay $3.30 per ton more for bags. Bags are not needed on a large percent of the stock salt, but farmers are forced to pay this added cost 'Outside' producers cannot ship in bulk because the Michigan-Kansas producers said not." (31)

In addition to the discontinuance of brokerage payments to buyers, the files indicate that in October, 1934, the Salt Producers' Association passed a ruling whereby the maximum commission which might be paid to a broker could not exceed 5% of the net amount of the invoice. This association ruling was protested by two brokers who had been receiving 10% brokerage. The International Salt Company, in response to one of these complaints, indicated that it had cut its brokerage commission to certain brokers because of the fact that it had been giving 10% to some brokers and 5% to others, and that all brokers should be placed on the same basis in order to avoid price discrimination, which is contrary to the Salt Code. No further information on this subject is contained in the files. (26)

The activity with respect to brokerage is closely related to restrictions on bulk shipments to certain resellers, discussed in Section IX of this Chapter. In both instances, an attempt was made to place certain middlemen - cooperatives, buying agencies, jobbers, and dealers, in a position where it would be difficult, if not impossible, for them, to maintain or increase volume by price concessions frowned upon by the manufacturers.

H. Restrictions on Sales to Certain Classes of Outlets.

No Code provision directly restricts sales to certain classes of outlets. Under sub-section C "Price Differentials", sub-section G, "Brokerage", and sub-section I, "Restrictions on Size or Manner of Making Shipments" in this section, will be found a discussion of some trade practices having the effect of restricting sales to certain classes of outlets - jobbers and cooperatives. In addition to those practices, the files disclose some additional restrictions which (according to a comparison of price lists) apparently were generally adopted by industry members.

One of these was the discontinuance of the sale of "stock salt". Some manufacturers entirely discontinued stock salt sales by a statement to that effect in price lists. (15) Others would sell stock

salt in bags only - discontinuing bulk sales.

Stock salt is apparently loose salt (either evaporated or crushed rock) which was bought by farmers for stock feed. It probably was competitive (because of its lower price) with pressed blocks or "cattle licks".

In a letter from a farmers' cooperated in Iowa, it is stated:

> "Northern Missouri and Iowa consumers are now forced to buy salt in bags - no bulk allowed in this territory. Why should the farmer be forced to pay 16⅔¢ every time he buys 100 pounds of cheap bag salt, to pay for bags he doesn't need? Why can't the producer ship bulk stock salt if he wishes? The producer in Texas or any other Southern Territory cannot ship into this territory in bulk because the Michigan-Kansas producers, who control this field, have ruled against it." (16)

No further information on this subject is contained in the files.

Mr. Dan Lutz, a truck gardner at Hartville, Ohio, wanted to buy some "fertilizer salt" to release potash in the soil, necessary to his product. In past years, he had purchased this cheap grade of refuse salt from the Ohio Salt Company. In the Spring of 1934, he found he could not buy any of this salt. In a letter to him dated March 27, 1934, the Ohio Salt Company stated:

> "Due to a recent code ruling, we are not permitted to sell this grade of salt (refuse grade) direct to the consumer. It will be necessary for you to arrange to buy salt of this kind through your local dealer, who will, no doubt, have something to offer you."

Mr. Lutz went to the local salt dealer, who informed him that a new "NRA ruling" prohibited him from selling refuse salt except to tile and brick factories.

Mr. Lutz appealed to the NRA, and was informed that no rulings of this nature had been made by the NRA, and that the NRA had no jurisdiction over the matter.(17)

There is no evidence to show who was responsible for the origin of the refusal to sell refuse or agricultural salt to farmers. This refusal apparently was not confined to the Ohio Salt Company alone, since the International Salt Company issued instructions to its sales department on November 30, 1933, stating that "agricultural or refuse salt" would be sold to Steel Mills, Fisheries, Ceramic Manufacturers, and for "track use" (by railroads), provided they would buy by the carload and pay $4.00 per ton. (This instruction seemingly implied that no agricultural or refuse salt would be sold to agriculturalists.)(15)

I. Restrictions on size or manner of making shipments.

No provision of the Salt Code directly imposes any restrictions either on persons to whom salt may be sold, or the manner of making ship-

ments. However, Article IV (a) of the Code, by prohibiting producers from selling at a lower prices than producers within the area in which the sale is made, permits producers within any area to practically dictate all terms and conditions of sale by all producers selling into such area. This has a direct bearing on the subject of this section, as will be developed herein.

An examination of price lists in effect prior to the Code discloses that prices on bulk salt were quoted to resellers, both in straight carloads and pooled carloads. Since no l.c.l. price lists are available, it is impossible to conclude from a study of price schedules whether bulk sales were made to resellers in l.c.l. lots. (15)

Shortly after the approval of the Code, price lists published by different manufacturers included the following provisions:

"No grades of salt in bulk or buyer's sacks will be sold to dealers, jobbers, or to anyone offering salt for resale."

This refusal to sell bulk salt to resellers apparently became the accepted practice in all area and on the part of all manufacturers as practically all available price lists to resellers during the Code period contained the above statement. (15)

The first complaint of which there is record in NRA files came from the A. P. Ames Company, a salt jobber in Peabody, Massachusetts. A telegram to the N.R.A. in December, 1933, stated that the Eastern Salt Company (subsequently shown to be the Massachusetts "selling agent" for International, Worcester, Cayuga, Watkins and Solvay Salt Companies, all of the New York producing area) had refused to sell salt in bulk to A. P. Ames Company (who claimed to have been buying an average of 69 carloads of bulk salt monthly in the past), on the ground that Ames Company was a reseller. At the same time larger industrial consumers who had been customers of Ames, such as the A. C. Lawrence Leather Company, were permitted to buy carload lots of bulk salt. (31)

This complaint was referred by the Deputy Administrator to the Secretary of the Code Authority, who replied:

"To correct unfair practices existing prior to the adoption of the Code, it has become absolutely necessary to decline to sell bulk salt to dealers, to prevent them from chiseling on our published prices for packaged salt with our own bulk. It has been the practice of some dealers, as a subterfuge, to purchase bulk salt with the sole purpose of defeating producers' published prices on packaged goods. A. C. Lawrence Leather Company is a leather manufacturer and uses in its own processes all salt purchased by them from Eastern Salt Company.

"A. P. Ames Company operates as a jobber or dealer and purchases not only salt but other commodities, and during upset market conditions was purchasing salt on the low priced bulk basis, then competing (with manufacturers) on salt sold to consumers. There would be no objection to selling to the complainant bulk salt in carloads or less than carloads

for consignment direct to its consumer customers, provided complainant complainant would agree not to divert such shipment to its own warehouse for packing and resale, and further that the complainant would agree to be bound by applicable provisions of the Salt Code, in which case the complainant would be classified as an agent or supply dealer and would receive prevailing rates of commission or discount applying to such classification. A representative of the Eastern Salt Company is taking this subject up with Ames. There is absolutely no disposition to work any avoidable hardship on the complainant or any other buyer in this effort to effect the necessary market improvement." (21)

(In an interview with the writer, Mr. Alber P. Ames, of the A. P. Ames Company, stated that he was never approached by a representative of the Eastern Salt Company with any proposal whereby he could buy bulk salt.) (32)

On January 23, 1934, a lengthy letter was sent to the N. R. A. by the Chamber of Commerce of Peabody, Massachusetts, explaining the manner in which Ames operated and requesting an investigation of the matter. This letter throws so much light on the entire question that it is quoted in full:

"The A. P. Ames Company, dealing in hay, grain and salt, has been buying salt in bulk in carload quantities from the Eastern Salt Company of Boston, Massachusetts, distributors for the International Salt Company. This was sold to the Leather manufacturers, generally after being bagged and was delivered in unites of not more than 3 tons.

"This enables the l.c.l. buyers to obtain their salt promptly and more cheaply than the Eastern Salt l.c.l. price. The factories buying bag salt in carloads found it advantageous to buy of Ames Company for the following reasons:

"1. Ames Company delivered salt at the facotry. When buying carload direct, the buyer had to unload the car, truck or pay trucking charges to the factory, and possibly pay demurrage.

"2. When a factory put in a carload lot, the chances were that due either to their allowing their supply to become too low before reordering or delay on the part of the producer or in transit, they would find themselves out of salt and were forced to pay a much higher price for the same to carry them over.

"3. Ames Company delivered in 3 ton lots, easily stored, and placed the lots in a more accessible spot for immediate use.

"4. Ames Company, being situated locally and keeping frequently in touch with their factories, has been able to overcome that trouble for them due to the frequency of their cars

arriving and because of their storage facilities.

"5. Factory space, otherwise needed for salt storage, could be used for more productive purposes.

"6. Ames Company with lower overhead cost could bag salt and sell cheaper than Eastern Salt Company.

"The result of this was that Ames Company began to get a business from many of the factories, especially when they appreciated the advantages that this service offered. This meant that some of the Eastern Salt Company's carload buyers of bag salt began to buy in small lots through Ames Company. However, this did not mean a reduction of the Eastern Salt's tonnage sold, because Ames Company's tonnage bought from the Eastern Salt Company increased. It did mean this: that the Eastern Salt Company or the International Salt Company (the parent company) was losing to a certain degree the added profits of bagging salt.

"This condition was led to the refusal on the part of all salt producers to sell bulk salt to resellers, such as Ames Company. This refusal has just been put into effect, with the publication of the 1934 price list for the New York territory (which includes New England) and applies not only to the Ames Company, but to all resellers in this territory at least, if not the whole country. Salt in bulk is sold only to consumers who agree not to resell.

"We consider this a restraint of trade; the various salt companies have combined through the medium of their salt code committee to put this practice under the NRA, when their code does not give the Code Authority any power to make such a provision. It is true that the Code Authority has a limited power over price fixing, but that power does not pertain to trade practices.

"The Salt producers have, apparently, one object, to get the entire control of the distribution of salt under their thumbs to freeze out the small middle man who can offer a local, efficient, legitimate service that the salt producers cannot. Once this control is gained, through the process of appointing 'distributors' which are but subsidiary companies, the price of salt will be subject to the whims of a legalized trust.

"Eastern salt prices for the year 1933, were as follows:

Bag price	$11.80	before October, 1933
	11.40	after October, 1933
Bulk price	10.80	before October, 1933
	10.40	after October, 1933

"Prices above, per ton in carload lots. LCL bag salt - $16.80 per ton, 5 ton lots the lowest.

"In contrast to this price, Ames Company's price list after paying a fair wage for labor and other costs, is as follows:

Bag price $13. ex car (directly from car to factory)

3 ton lots
$14 ex warehouse 3 ton lots
$15 ex warehouse 1 ton lots

"Bulk price $13 ex car only, Ames Company prices, it must be remembered, include factory delivery, insures regular supply and avoids use of excessive storage space, etc.

"Now let us compare the prices quoted from the 1934 price list of the Eastern Salt Company.

"Bag price $14.20 per ton carload lots
Pooled carload price, bagged $13.20
LCL $15.40 per ton, Bulk price - $10.90
per ton carload lot

"Ames Company price list based on buying bulk at $10.90 per ton.

"Bag price $14 ex car in 3 ton lots
$15 ex warehouse in 3 ton lots
$16 ex warehouse in 1 ton lots
Bulk price $14 per ton ex car

"These comparative prices tells our story. Ames Company, by offering services that manufacturers want, can get this business. They can give these services at a lower cost than the Eastern Salt Company although they have had to buy bulk salt from the Eastern Salt Company. Manufacturers would rather order a carload through Ames Company and have them deliver in 3 ton lots at their ex car price than buy direct from the Eastern Salt Company because Ames Company can render the service that saves them additional expense.

"The Eastern Salt Company is satisfied with the bulk price from big consumers. Ames Company a big consumer in a sense, is willing to pay that same price and has been buying in bulk for 29 years. The Eastern Salt Company cannot provide the service that Ames Company has rendered and that which the manufacturer wants. Ames Company has done this and was about to reap the reward of providing a needed service for business. Other local resellers throughout the country are in this same position. The salt companies are trying to freeze them out by refusing to sell in bulk to resellers.

"This means that Ames Company and other local resellers would have to pay $14.20 for bag salt per ton. They cannot pay this price and privide the service wanted under the above price list of Ames Company.

"We believe the facts warrant some investigation by the N.R.A." (21)

In response to this letter, the Deputy Administrator on February 9, 1934, referred the matter again to the Code Authority, and so advised the complainant. (21)

On February 10, Ames requested that the ruling against bulk sales to resellers be suspended until a final decision was reached thereon. (21)

No action was taken by the NRA on this request.

On February 13, the Code Authority stated that

"it does not believe the questions involved are within its jurisdiction.... Each producer in each field of production individually makes and publishes his own prices.... Producer in question (International has been requested to prepare a statement setting forth his position, which he promises will be sent to you early next week." (21)

On February 14, the International Salt Company wrote the N.R.A., stating that it refused to sell salt in bulk to resellers for substantially the reasons set forth in the letter from the Secretary of the Code Authority to the N.R.A. (already quoted in this section). The letter continues:

> "There is no justification whatsoever for the complaiant's statement that the 'salt companies are trying to squeeze out resellers by refusing to sell them salt in bulk.' However, International Salt Company, under the Salt Code, and Eastern Salt Company, without a code, claims the right to sell the product on such terms and conditions as are fair and reasonable, and without discrimination between buyers. We claim that the complainant has in the past operated in a destructive way, which is clearly admitted in his letter, which states, referring to past practices of complainant: 'This enabled the l.c.l. buyers to obtain their salt promptly and more cheaply than the Eastern Salt Company's l.c.l. price.' This applies even more disruptively against this company and other producers operating under the salt code....
>
> "The method of distribution and sales to our customers, and the price charged for salt, are in no way subject to the jurisdiction or control of the code committee, but are, as stated, entirely within the province of each individual producer in the respective marketing fields set forth in the salt code. This company has adopted a plan of marketing which is based upon its own experience over a period of upward of thirty years, and the general experience of the industry. Many practices detrimental to the industry have developed from time to time, and we have consistently attempted to follow a course of action which would eliminate them when found objectionable.
>
> "We maintain the right to protect ourselves and our customers against such competition, and to sell our salt to whomsoever we please at such prices and terms of sale as we may publish in accordance with the provisions of the salt code. We cannot be forced to be placed in a position nor to adopt practices that would result in selling salt to customers who in turn resell in competition with ourselves at prices and terms that result in demoralization of the market, and a loss of revenue to us and the industry.
>
> "The grade and type of salt principally sold to such resellers as the complainant represents only a small part of our total evaporated salt tonnage, and we cannot afford to create or permit a situation whereby a small tonnage would control or seriously affect the major and more profitable part of our business....

> "Our classification of salt distributors is confined to buyers whose principal business, or at least a substantial part thereof, is the sale and merchandising of salt. Our published prices for consumers provide that the smallest unit of sales shall be a carload.... However, such buyers may obtain smaller quantities by paying a higher price.... To protect ourselves as well as the majority of our distributors, we cannot sell bulk salt to customers who would package the same and resell at little or no profit in competition with us...." (21)

On February 26, 1934, Deputy Administrator Paddock advised the complainant:

> "1. That no provision of the Salt Code nor ruling of the Code Authority prevents Eastern Salt Company from selling to Ames. 2. That no provision of the above code gives the NRA any authority to demand that Eastern sell to Ames if they do not desire to do so. It is therefore decided that the matter is not one coming within the jurisdiction of the Administration. (21)

On March 10, the complainant pointed out that not only International, but every other salt producer simultaneously refused to sell bulk salt to Ames and other resellers, indicating collusive action to place producers in complete control of all distribution by the elimination of distributors not under an agency contract with them. (17)

The Deputy Administrator again stated that the N.R.A. had no jurisdiction over the matter and the case was considered closed. (17)

The A. P. Ames Company apparently referred the matter to the Federal Trade Commission, as the files contain a letter to the Deputy Administrator dated July 17, 1934, from David Miller, Attorney-Examiner, New York Branch Office, Federal Trade Commission stating that:

> "An investigation is being made with reference to the various salt manufacturers refusing to sell bulk salt to resellers. Should you have any information along this line, I would appreciate such information. Mr. Ames of the A. P. Ames Company has given your name as one with whom he has had correspondence." (17)

(A new Deputy had been placed in charge of the Salt Code, who apparently either misunderstood the question or was not informed of the controversy relative to bulk sales to resellers, as his reply dealt entirely with the subject of brokerage payments to buyers, and does not touch upon the restriction of bulk sales of salt.) (17)

The Federal Trade Commission later advised the complainant that the case had been closed, on the ground that "it does not appear that the respondents are engaged in practices coming within the purview of the laws administered by the Federal Trade Commission." (32)

Many other complaints were received on this subject, some of which throw additional light on the effects of the discontinuance of bulk sales to resellers. For example, a letter was received by the N.R.A. on March 8, 1934, from the Consolidated Salt Company, Norfolk, Virginia, who stated that they had been jobbing salt for many years, buying from several producers and reselling to wholesale grocers, ice manufacturers, fish packers, ice cream manufacturers, etc. Since the first of the year, the complainant had been informed that because of the N.R.A. code, the sale producers could not sell to him for resale. The complainant requested that something be done to assist him.

The matter was referred to the Code Authority and some three weeks later the Secretary replied, stating that he had just been informed that the complainant was no longer in business, having gone in to the hands of receivers. He suggested that in view of this fact, there wasn't much more that could be done in the matter. No further action was taken. (17)

Some of the complaints stated that packaged salt cost 25% more than bulk, others put the figure as high as 50% (depending, presumably, on differences in grades of salt, freight charges, etc.)

Other complaints indicate that although the Code Authority disclaimed all responsibility and authority, it still played an active part in these matters. (16), (17), (25)

On a complaint from a jobber in Cincinnati, who formerly purchased mixed carloads of bulk and packaged salt, the Code Authority stated that the practice had been discontinued because of the fact that damp bulk salt was apt to dampen or otherwise injure packaged salt, and many manufacturers had for this reason discontinued mixed car shipments containing bulk salt. (22), (25)

Occasionally, consumers were included in this restriction by mistake. On a complaint from a stock feed manufacturer from Virginia, who had been informed that an NRA ruling prohibited sales of bulk salt to him, the Code Authority advised the Deputy Administrator that "on the basis of his representation as a consumer of salt, he is entitled to purchase bulk salt, and will have no more difficulty as a consumer in purchasing salt in bulk from producers." (22), (26)

The American Dairy Company, Syracuse, through a Congressman, complained that the ruling against bulk shipments would put them out of business very shortly unless rescinded. On reference to the Code Authority, that body replied that no ruling had been made, but that producers had individually decided to discontinue the practice. "Salt shipped in bulk is subject to contamination the moment it leaves the plant, and is subject to further unfavorable influences and unsanitary conditions when taken from the freight car and transported elsewhere. Under the circumstances, it can be appreciated that producers have adopted precaution to protect the public when selling salt for human consumption." (25)

Whether or not the Code Authority was responsible for the uniform and simultaneous development of this restriction, the NRA received the blame. Many of the complaints started out with a statement to the effect that salt producers or salesmen had told them "because of the NRA ruling", or "because of the NRA code", they couldn't sell bulk salt, much as they would like to continue the pleasant relations which had existed for so long. (16), (25), (26)

No definite information is contained in the N.R.A. files as to the actual effect on the volume of sales through jobbers, or on the jobbers themselves, or on manufacturers who previously sold through jobbers. However, interviews with a salt producer and with distributors of salt have developed sufficient information to throw considerable light on the reasons underlying the restriction on bulk sales to resellers, and on the efficacy thereof in accomplishing the desired ends.

Two entirely different reasons are given for the development of this restriction. The first, voiced both by the Code Authority and by individual manufacturers, is that salt shipped in bulk is subject to contamination, and that salt producers wished to make it impossible for a buyer to secure a carload of loose salt, package it, and resell the same as salt fit for human consumption.

The second reason is an outgrowth of the fact that there is more profit in the sale of packaged salt than there is in bulk salt. (5) As is set forth in Section I of this report, the U. S. Tariff Commission indicates that over 50% of the total tonnage of salt is sold in bulk. This includes both rock and evaporated salt.

The Tariff Commission report (5) contains a breakdown of bulk shipments by types of salt, from which it appears that approximately 70% of rock salt; 60% of solar evaporated salt; 30% of vacuum pan evaporated salt; and 20% of grainer or open pan evaporated salt, is sold in bulk.

As has been stated in Section I, rock salt and evaporated salt are potentially competitive so far as industrial uses are concerned. The price which can be charged for evaporated salt for industrial purposes is limited or restricted by the price of rock salt. Many large industrial users, at present buying evaporated salt in bulk, would turn to rock salt if the price of evaporated salt became too high. These large buyers would prefer to buy a carload of salt in bulk, rather than paying a higher price for salt placed in sacks by the manufacturer.

A ceiling is placed on the price of both rock and evaporated bulk salt because of the fact that if prices become too high, large industrial users are capable of commencing the production of their own salt requirements, as a number of chemical companies, two large meat packers, and one large food manufacturer, have already done. Salt producers know that there is real danger of permanently losing some of their larger customers if prices on the salt purchased by such buyers are not kept down.

For these reasons, as well as competition between members of the salt industry for the business of large industrial buyers, the sale of bulk salt has been conducted on a very narrow margin of profit even in prosperous years.

However, evidence indicates that an effort has been made to restrict the sale of bulk salt to those buyers who are in the best position to enforce their demands for the same. In other words, that the industry has attempted to reduce the total volume of salt which is sold in bulk, attempting to substitute therefor packaged salt on which there is a considerably greater margin of profit.

The industry discontinued the practice of shipping mixed carloads of bulk and packaged salt. They practically eliminated the shipment of bulk in l.c.l. lots and at least one producer (International) discontinued the shipment of bulk salt in pooled cars to consumers, as well as providing that pooled car shipments of packaged salt must bear an l.c.l. freight rate. Of more direct importance to this study, during the code period they attempted to eliminate bulk shipments to resellers.

This was of advantage in two respects - first, it assisted in reducing the total sales of bulk salt, substituting therefor the more profitable packaged salt; and second, it reduced the possibility of resellers purchasing bulk salt, packaging it, and reselling the packaged product at lower prices than would be charged for the product by the manufacturer in its packaged form.

As long as resellers were in a position to package salt themselves, and resell in competition with manufacturers' packaged salt, the manufacturers' prices on packaged salt could not be maintained at as high a level as desired by them, lest the resellers encroach too much on their package sales.

It should be mentioned that the restriction of the sale of bulk salt to resellers apparently did not apply to "distributors", defined in sub-section A of this section. These "distributors", operating under contracts with manufacturers, or direct orders of their manufacturer-owners, could be depended upon not to package bulk salt and resell in competition with their consignors.

Interviews with a salt producer and with distributors of salt indicate that jobbers of salt adopted two different methods of remaining in the business of selling salt. The first, acceptable to the Salt Industry, was for the jobber to continue to act as a jobber of packaged salt, but changing his method of operation with respect to bulk salt from a jobbing operation to a selling agency operation, comparable in some respects to a brokerage transaction. That is, the jobber could order bulk salt from a manufacturer, to be consigned direct by the manufactuer to the industrial user. On this type of business, the jobber (never coming into possession of the salt) would receive a discount or commission comparable to that given to brokers. Definite information is not available as to whether the manufacturer billed and collected from the industrial user, or considered that he had sold the salt to the jobber, though consigning it to the industrial user.

The second method utilized by the jobber to remain in business was one far less satisfactory to the industry. Jobbers would enter into agreements with industrial consumers, whereby such consumers would accept consignment of a carload of bulk salt. However, the jobber would actually unload the salt and store it in his warehouse, packaging it for resale, or reselling it in small lots. In this fashion, industrial buyers incapable of buying in carload lots, could still receive salt from the jobber at a price less than the l.c.l. rate, and less than the price which would be charged him for packaged salt purchased from the manufacturer.

Although definite information is not available on this point, it seems probable that jobbers may be given a selling commission or brokerage by manufacturers on salt ostensibly sold to industrial buyers, but actually purchased and received by the jobbers. If this is true, it means that the jobbers who developed this method of evading the restriction against bulk sales to resellers,

actually were enabled to purchase bulk salt at a lower cost than before the restriction, when they paid the same price as industrial buyers for carload quantities, without receiving any selling commission or discount.

The statement was made to the writer of this report that following the restriction on bulk sales to resellers, there was a considerable increase in sales through brokers, at least in New England.

The extent to which jobbers made use of the above mentioned methods of evading the restriction on bulk sales to resellers is not known, and consequently it is impossible to indicate the actual effect of this restriction on jobbers, or the volume of salt being sold through jobbers, or total volume of bulk shipments. (35)

In addition to the discontinuance of bulk sales to resellers, an examination of price lists discloses some additional restrictions on size or manner of making shipments, which developed after the approval of the code.

Following approval of the code, most of the price lists on file included a list of marketing provisions practically uniform throughout the trade. Following are some of the requirements or restrictions which were not contained in price lists prior to the code:

> "No table salt pockets to be shipped loose in smaller units than 25 lbs."
>
> "Iodized salt in cartons to be marketed only in round cans of 26 oz. and 2 pounds".
>
> "Stop-over charges to be paid by buyers. On stop-over shipments, prices for entire shipment must be based on highest-rate book rate" (point of final destination usually).
>
> "Should one buyer purchase a sufficient amount to entitle him to a carload discount, and allow other buyers to have shipments included in the same car, the other buyers must pay full list price, without any quantity (or carload) allowance."

No information has been developed or past practices with respect to the above matters, or effects of any change that might have taken place and do not regard them as important.

Prior to the code, International Salt Company price lists imposed no restriction on pooled car shipments to industrial users. Following the code, International price lists provided that pooled car shipments in bulk could not be made to consumers, and that consumers buying salt (packaged) in pooled cars must pay the appropriate l.c.l. rate. (15)

There is no information as to whether or not other manufacturers followed International in this respect.

PRICE DISCRIMINATION

Article IV (c) of the Salt Code contains the following provision on price discrimination:

> "There shall be no discrimination between customers. Difference in price based on differences in grades, quantity, quality, selling or transportation costs, or made in the same or different communities in good faith to meet competition, shall not constitute discrimination."

It does not appear that this provision played a very important part in the history of the code. Under the "Quantity Discounts" sub-section of this chapter is discussed a futile attempt to invoke this provision to stop the granting of special discounts to chain stores, but the Code Authority did not take any definite action.

In the "Consignments" sub-section of this chapter is made of a Code Authority ruling that if consignments were made to any customers, they must be made to all customers.

III. SUMMARY AND ANALYSIS

In this Section, an effort is made to analyze and correlate the information contained in the previous two sections, with the hope of gaining an understanding of the problems of the industry, the methods selected by the industry to solve those problems, and the results of such methods.

A. The Problems

Certain general characteristics of this industry and its product should be noted. The demand for salt is relatively inelastic compared to the demand for products of other industries. This is particularly true of table, or household, salt. Consumption of this type of salt does not appear to be seriously affected by price fluctuations, which means that the total volume of table or household salt cannot be expected to be materially increased by a reduction in the general price level for such salt; and at the same time, an increase in the general price level probably would not materially reduce the total consumption of table salt.

To a lesser, but at the same time a marked degree, the same thing is true of industrial salt. The industry cannot expect to materially increase the total consumption of industrial salt by a reduction in general price levels. New uses for salt are being developed -- such as the use of salt on dirt or clay roads in the same manner and for the same purpose as calcium chloride has been used in the past - but new markets have developed slowly, and the general belief has been expressed by members of the industry that any gain in volume for the industry as a whole as a result of price reductions would be more than offset by a loss in net profits.

A very important exception should be made to the general rule of stability of demand. Although price reductions cannot be expected to result in any material increase in total consumption of salt, price increased might result in the permanent loss of a considerable portion of the market for industrial salt. Large industrial consumers are entirely capable of entering into the production of salt brine to fill their salt requirements should the price of crystalline or solid salt be raised to too high a level. This threat to the industry is not an idle one, as many large chemical producers have already stopped buying salt from the members of this industry, preferring to produce their own salt in the form of brine, at a much lower cost to them than if they had to purchase the salt required. At the present time, nearly half of the total industrial requirements for salt are filled in this manner, which means that salt producers have permanently lost a very considerable portion of their market. Also, two of the largest meat packers in the country now operate their own salt mine, having found that it would cost them less to produce the salt than to buy it. The General Foods

Corporation is the owner of the Diamond Crystal Salt Company (reputed to be the fourth largest salt producer in the country), and this salt company probably supplies the entire salt needs of General Goods. There is no assurance to salt producers that other large industrial buyers will not follow the same course if prices on salt are raised too high.

Salt deposits, capable of commercial exploitation, exist in nearly a dozen States, and anybody with sufficient incentive and money can begin the production of salt.

The fear of encouraging salt users to enter into the production of salt is greater in the case of industrial salt than it is with table salt. There is little danger of the average household consumer, or for that matter the average retail or wholesale grocer, becoming a salt producer because prices are too high. Of course, it is presumed that chain stores are capable of such action, which may help to explain the fact that salt producers in most of the marketing areas allow a special discount on table salt to retailers big enough to use $100,00 worth of salt per year, for which discount only the national chain stores can qualify. In general, however, there is a much better opportunity for high price levels on table salt than there is on industrial salt.

Similarly, small industrial consumers are not as well equipped as large consumers to protect themselves effectively against price increases, and sales to this type of buyer do not have as low a price ceiling as to sales to large industrial buyers.

A further factor helps to complicate the picture — the competitite status of rock and vacuum pan evaporated salt for industrial uses. Rock salt can be produced at a lower cost than vacuum pan salt, but the latter salt is better adapted to many industrial uses than is rock salt. Therefore, evaporated salt is purchased by many industries at a higher price than they would have to pay for rock salt. Should the differential between rock and evaporated salt become too great, however, the saving in cost of rock salt would outweigh the technical advantages of evaporated salt, and many buyers would turn from evaporated to rock salt. As a result, the price on the cheaper grades of evaporated salt is influenced by the price of rock salt, and the price differential between the two grades, for sales to industrial users, must not become too great. Furthermore, it is possible to divert common vacuum fine salt from industrial to domestic uses. Buyers could purchase this grade of salt, presumably for industrial uses, then place it in packages for household use. Since they were able to get the salt at a low price as industrial salt, it could be repackaged and sold as table salt at a correspondingly low price, thus embarrassing salt producers depending on their ability to make a good profit on table salt. Buyers engaging in this practice usually were distributors, rather than industrial consumers.

Industrial buyers usually prefer to buy salt in bulk, rather than

in sacks or other containers, because of the saving in cost. Packaged salt naturally is more expensive than salt shipped in bulk, both because of the cost of the sacks and the charge made by the manufacturer for filling the same.

From 1929 to 1933, over half of the total salt produced was shipped in bulk. Because of the fact that very many of the customers who purchased bulk salt were large buyers, the price charged by the industry for bulk salt could not be raised without danger. Consequently, it is claimed that for years, there has been no profit in bulk salt, the really profitable end of the salt producing business being in packaged salt. The industry evidently believed that if it were possible to reduce the volume of salt sold in bulk, and proportionally increase the volume sold in packages, there would be a greater potential opportunity for profit. If this could be done without danger of losing the large industrial consumers of salt, so much the better. Over a period of years, the industry made some progress in this direction. First, the industry discontinued the practice of shipping table salt in bulk, and later discouraged the shipment of bulk salt in less than carload lots. How to make further decreases in bulk salt sales, without endangering volume, was one of the problems in the solution of which the code evidently was designed to help.

A decrease in bulk shipments, and an increase in packaged sales would make theoretically possible an increase in profits, but unless something were done to make this possibility an actuality, small benefit would accrue to salt producers.

Something must also be done to protect the prices charged for packaged salt, lest price levels for this type of product decline to unprofitable levels. Several factors were present which imperiled the price structure on packaged salt.

The statement made previously that the demand for salt is comparatively stable or inelastic does not mean that no individual company can expect to increase his volume of sales by a reduction in price. On the contrary, volume is very sensitive to price in this industry, largely due to the fact that quality is well standardized and fairly uniform, at least on most grades of salt. A producer who reduces his prices may expect to secure an increase in volume, but since that increase means that some other producer or producers will lose just as much volume as the original manufacturer gains, his price reduction is likely to be met very promptly, this resulting in the same competitive status as existed before, except that the price level has been reduced.

As is probably the case in other industries where overhead is an element of cost, and where price is naturally the most effective weapon of competition, (differences in quality being practically non-existent), there is a strong temptation on the part of individual producers to reduce prices in order to gain increased volume, thereby reducing unit cost and increasing net profit. This temptation is counteracted to some extent, though not entirely, but the certain knowledge that other producers must meet the reduction in order to maintain their own volume. Prices can be cut easily, but price increases are considerably more difficult of attainment. In many instances, at least, they come only as the result of the elimination of competitors, or a tacit or outright agreement between competitive producers to raise prices at the same time.

The history of this industry indicates repeated attempts to promote price stability, by eliminating price as the outstanding weapon of competition between members of the industry. Aside from the activities of the National Salt Company trust in the 1890's, when there was an attempt to gain a monopolistic control over the sale of salt with an accompanying increase in prices, little is known about the industry prior to 1914 -- the year in which the Salt Producer's Association was organized. In the years following 1914, the members of the industry sold on the basis of published price lists, and it is apparent that one company was the accepted price leader for the industry, at least so far as evaporated salt was concerned. Other members of the industry adopted the prices quoted by the leader, and a marked degree of uniformity in published prices has been evident for the past twenty years. For a number of years, it was the practice of many members of the industry to copy the price schedules of the price leader, and this may still be the manner in which uniformity is achieved and maintained.

The reasons underlying the apparent willingness of all members of the industry to quote prices the same as those of other producers are not known. There is reason to believe that one of the influences was fear on the part of the smaller producers of reprisals against those openly underselling the larger producers. Also it is possible that the members of the industry were cognizant of the futility of open price warfare, in view of the fact that price reductions, when known, would certainly be met by competitive producers, and the producers with the longest pocketbooks would be the least harmed.

The attainment of complete price uniformity and the elimination of all forms of price competition would materially assist in the maintenance

of prices at as profitable a level as possible. Uniformity in published prices was a long step in this direction.

Before there could be actual uniformity even in published prices, variations in nomenclature, quality and packaging had to be eliminated, in order that a comparison would be possible between prices quoted by various manufacturers on a specific grade of salt, packaged in a specific way. Since 1914, the Salt Producers' Association has been engaged in the standardization of quality and packaging, with such success that differences in quality, nomenclature and packaging are practically non-existent, with the exception of a few grades of higher-priced salt, where relative quality still appears to be a factor considered by the buyer.

Transportation costs amount to such a large part of the cost of salt to the buyer (estimated to be fifty percent of the average delivered price of salt) that it would be impossible to attain price uniformity at any given point as long as there existed any variation in transportation charges between various plants to such point. For many years, the industry has sold salt under a form of basing point system whereby transportation charges to any delivery point would be the same on all shipments to that point, no matter where such shipments originated. This was accomplished by the division of the country into a number of marketing areas. The Trade Association compiled and issued freight rate books for each State, such rate books containing the name of every delivery point within the State, together with the freight rate to such point from the nearest producing plant. Separate price schedules were issued by each manufacturer for each marketing area into which he desired to sell salt, and the delivered price was calculated by adding to the base price for such area the freight charge set forth in the freight rate book to the point of destination. Thus transportation charges became uniform between the various members of the industry.

There could be no price uniformity if only base list prices were the same but discounts were dissimilar. In order that discounts, and hence net prices, quoted by manufacturers to any particular buyer, might be uniform, there must be uniformity in customer classification, so that all producers would allow the same discount to such buyer. The Trade Association was instrumental in attempts to establish uniform customer classification. For example, the Trade Association kept on file a list of all brokers receiving brokerage commissions, and informed the members of the association whenever it developed that somebody claiming brokerage had been cut off from the brokers list because of affiliation with buyers. Also, members of the association agreed to allow a "jobber's discount" only to those wholesale grocers whose names were contained in certain directories of wholesale grocers, thereby eliminating confusion as to who were and who were not entitled to be classified as jobbers to receive the jobber's discount. The Federal Trade Commission in 1922 required the discontinuance of this means of classifying customers, following which the members of the industry eliminated trade discounts to jobbers. The elimination of jobbers' discounts simplified the problem of obtaining uniform classification of customers, by removing the necessity of distinguishing between various types of distributors. No trade discounts were given to resellers, and the only discount given to resellers was a discount based on quantity.

By 1933, the industry had evolved a comparatively simple method of classifying different customers, generally followed by individual producers. Different price lists were issued to different classes of customers, including resellers; consumers (industrial users); high-grade industrial consumers (consumers of certain more expensive grades of salt). Discounts to the different buyers were based primarily on quantity, and were uniform throughout the industry. Some trouble still was experienced in the definition of individuals entitled to brokerage, and this difficulty was carried into the code period.

At the time of the proposal of the code, the industry had made considerable progress toward the attainment and maintenance of price uniformity or, stated in a different way, the subjugation of price as a competitive device. However, there still remained three major obstacles to overcome before this objective could be attained.

First, although all members of the industry sold on the basis of published price lists, there was no assurance that these published prices would be adhered to by the various producers. Particularly during time of depression, in efforts to bolster declining sales volume, many members of the industry offered secret prices, discounts, rebates, and other concessions. The price stability program of the industry depended to a large extent on price publicity -- knowledge of the prices at which each competitor was actually selling his product -- and the existence of secret price concessions was a serious problem.

Second, the control of the price leaders over prices and actions of other members of the industry was a tenuous thing. The incentive to reduce prices to make an advantageous sale, or make a greater freight absorption in order to expand a producer's marketing area, or to dump salt in some other territory in order to boost volume and reduce unit costs, was oftentimes sufficiently great to overcome fear of retaliatory price cutting. In an endeavor to secure an immediate advantage, some manufacturers were prone to forget or ignore possible long-time effects of their actions, or else, recognizing the dangers involved, believed the advantage would outweigh the possible ultimate effects. Furthermore, certain members of the industry, owned by large industrial consumers of salt, were in a position where they need not be particularly concerned about the possibility of retaliatory price cutting. Their own salt requirements were sufficient to take care of an appreciable percentage of their salt plants' output, and they were not wholly dependent upon profit from their salt producing operations.

Third, price uniformity between manufacturers was threatened by reason of the fact that distributors -- jobbers, cooperative buying organizations, dealers -- occasionally resold salt at lower prices than were quoted by salt producers to such resale trade. For many years, salt producers had distributed salt both through jobber middlemen and in direct sales to consumers and retailers. By 1929, it is estimated that between two-thirds and three-fourths of the total sales of industrial salt were made direct to industrial consumers, most of the remainder being sold through jobbers, and dealers; and that about half of the sales of domestic salt were made direct to retailers, the

remaining half being sold through wholesalers. As long as it was possible for independent distributors of salt to resell at prices less than those quoted by manufacturers for direct sales, manufacturers were confronted with the alternatives of (1) varying their prices to meet those of the distributors, thus sacrificing price uniformity among manufacturers; (2) discontinuing direct sales; or (3) finding some means of eliminating price competition on the part of distributors.

B. The Code Program Developed To Meet The Problems.

In the previous pages, there have been described what it is believed the code proponents considered to be the two basic problems confronting the industry: First, how to decrease bulk sales and increase packaged sales; second, how to eliminate or subjugate price competition.

Under the code, an attempt was made to solve both of these problems. The three remaining obstacles to price uniformity were attacked in the following manner:

First, the code contained a requirement that all prices, terms and conditions of sale be set forth in open price lists, which must be rigidly adhered to; and prohibited rebates, secret allowances of all kinds, free deals, storage of salt with customers, and other similar concessions. In this manner, attempt was made to overcome the threat to price uniformity caused by the existence of secret price competition. (Art. IV, Code, Exhibit IV).

Second, a firmer control over prices was enabled by reason of the "market protection" provision of the code, which provided for the division of the United States into a number of "natural marketing fields," based on the different producing fields existing throughout the country. The code further provided that "the minimum prices published in any marketing field by any producer in that field shall be the lowest prices at which any producer may sell in that field." Under these provisions, the country was divided into ten "natural marketing fields," and the minimum price at which salt could be sold within each field was the lowest price filed by a producer in that field. In this fashion, the threat of dumping or price wars between producing fields was overcome. Furthermore, this division of the country into protected marketing areas enhanced and strengthened the possibility of controlled prices within each field. Between them, the two largest companies -- the natural price leaders -- had plants in eight of the ten marketing fields - which eight fields embraced 44 of the 48 States (*.25). In each of these eight marketing fields, one or the other of the two largest producers could cut prices to any extent desired by them, and were therefore in a position to discipline a smaller producer whose prices got out of line, without risking any nation-wide price war as a result. The principle is somewhat similar to bulkheads in a boat, in that there could be a price war in one area, without its spreading to other areas. In addition it is easier, as a general rule, to secure an agreement between five or six persons than it is to attain agreement between thirty or forty people. It is also easier to maintain adherence to the agreement in the case of the smaller group. Third, during the

code period, a number of restrictions developed on sales to resellers, their combined effect being to impede the ability of distributors to resell at prices under those quoted by producers for direct sales. Some of these restrictions were established by the Code Authority under guise of the code. Others were attributed by individual producers to the code, but actually were not authorized by the code. Still others resulted from actions of the Salt Producer's Association during the code period.

Some of these restrictions had forerunners in years prior to the code. For years, salt producers had urged jobbers to refrain from reselling at prices lower than those published by manufacturers to retailers and consumers. Prior to the 1920's, it was customary to allow a trade discount to jobbers evidently giving a sufficient margin to permit jobbers to resell at less than the producer's prices on direct sales. Many difficulties confronted any effective control over resale prices. First, salt was sold through such a wide variety of jobbers that it was difficult to keep any effective supervision over their sales. Second, it was exceedingly difficult to properly classify a jobber to qualify him for a jobber's discount -- so many of them were affiliated in some way with retailers, or did some retail business themselves. These difficulties were particularly important in view of the fact that many salt manufacturers probably didn't care particularly whether their distributors maintained resale prices or not.

In order to eliminate these difficulties as far as possible, the Salt Producers' Association in 1914 decided that jobbers' discounts should be given only to wholesale grocers, and adopted as a guide certain directories of wholesale grocers. The Federal Trade Commission in 1922 issued a cease and desist order against the practice of allowing trade discounts only to wholesale grocers whose names appeared in the above mentioned directories.

Following the action of the Federal Trade Commission, it became the practice of the industry to allow discounts based only on quantity, discontinuing the allowance of trade discounts to all jobbers.

This reduction of the jobber's operating margin was the first step toward reducing his opportunity to undersell the producer making direct sales.

Action had also been commenced toward the elimination of brokerage payments to buyers or agents or affiliates of buyers. The trade association maintained a list of brokers in good standing and notified members of the fall from grace of brokers found guilty of affiliation with buyers. Because wholesale cooperative buying organizations naturally could not be expected to maintain the prices quoted by manufacturers to local, or retail cooperatives, certain members of the industry, at least, discouraged sales to such wholesale cooperatives, particularly farmers' cooperative buying organizations.

The program carried on during the code period was a continuation and enlargement of the pre-code activity.

Farmers' wholesale cooperatives, during depression years at least, were being given brokerage commissions from a number of producers. This brokerage payment operated precisely as did the old trade discount to jobbers. It afforded the wholesale cooperatives a margin which permitted them to resell to constituent cooperatives at a price below that at which they could buy direct from the producer.

An effort was made by the Code Authority to have the code interpreted to prohibit the allowance of brokerage payments to these cooperatives.

Apparently the objectives was finally attained - not under any official interpretation by the NRA of any code provision mentioning brokerage, but under the "market protection" provision, which was evidently construed to mean that unless the producers within any marketing field granted brokerage to cooperatives, no producer outside of that field could grant such brokerage on sales into the field. It is not known whether this restriction applied with the same force to buying organizations composed of wholesale or retail grocers as it did to those controlled by farmers, although there is some reason for a conjecture that such was not the case.

Another, and extremely important, restriction which developed during the code period was the discontinuance of shipments of salt in bulk to resellers. This restriction accompanied other similar restrictions, including the discontinuance of bulk salt shipments in mixed carloads (bulk and packaged salt in the same car); discontinuance of bulk salt shipments to farmers; discontinuance of bulk salt shipments in pooled carloads. These restrictions, while not the result of any official interpretation of the code, accompanied the development of the code program, first appearing in price lists shortly after the approval of the code. Again, the amazingly versatile "market protection" clause of the code appears to have been construed to prohibit "outside" producers from making bulk shipments to resellers, or in mixed or pooled carloads, or to farmers, in any area if the local producers in such area did not make such sales.

This type of restriction was capable of accomplishing the double purpose of decreasing the total sale of bulk salt and assisting in the maintenance of price uniformity, with consequent elimination of price competition. The restriction in the sale of bulk salt was not accompanied by danger of losing large industrial buyers, since industrial buyers capable of purchasing a carload of salt at a time could still secure bulk salt. However, resellers and industrial buyers incapable of purchasing full carloads were required to purchase packaged salt. Thus the industry engaged in a program whereby price increases would be made possible on sales to buyers who were not in a position to effectively protect themselves against such price increases; yet at the same time no risk was run of losing the business of large buyers.

This type of provision, particularly the restriction on bulk sales to resellers, was designed to assist the maintenance of price uniformity due to the following circumstances.

Following the discontinuance of jobber's discounts several years ago, it became apparent that jobbers might still be able to profitably undercut producers' prices in sales to the smaller retailers and industrial buyers. Either as a result of a decision of salt producers, or because of difficulties involved by reason of railroad regulations or rates, it was not customary for producers to ship bulk salt in l.c.l. lots. Purchasers unable to buy as much as a carload of salt at a time would be required to buy packaged salt, and in addition to the higher price for this type of salt, would have to pay a proportionately higher freight rate on their l.c.l. purchases than if they had purchased in carload lots. Jobbers, buying bulk salt at a much lower price than was charged for packaged salt, and receiving a carload discount as well as a cheaper freight rate, found it possible to sell to these smaller buyers at a price under that quoted to them by producers. They could either deliver the salt in small lots in bulk at a considerably lower price than that of producers, or could package it and still undercut the producer. Moreover, jobbers occasionally purchased industrial salt and packaged it for sale as table salt at a price below that charged by producers for their table salt. All this was aggravating to producers since the packaged salt business was more profitable than the bulk salt business.

As a result of the discontinuance of bulk sales to resellers during the code period, the only remaining basis upon which resellers -- jobbers, dealers, cooperatives -- could operate was the carload discount granted by the producer. The effect varied with different kinds of salt. Producers realized that it would not be economically feasible to attempt to make direct sales of domestic salt to all retail grocers, and wished to continue to utilize the services of wholesalers for distribution to this type of outlet. Accordingly, the carload discount on table salt varies between 13% and 18%, giving the wholesaler a good margin on which to operate, through the purchase of carload quantities and resale to small retailers in l.c.l. lots. The producer retains direct sales to retailers large enough to buy a carload of salt at one time, and, by reason of the large discount, encourages retailers to buy direct carloads whenever possible. (As will be developed later, producers apparently were not concerned over the fact that certain retail grocers were enabled to buy salt at much lower prices than other smaller retailers).

The carload discounts on industrial salt are very much smaller, ranging from 3% to 8%, depending on the kind of salt. As a result, jobbers were not given a sufficient margin to enable them to undersell the producer on industrial salt and in many instances, the margin was not sufficient to permit the jobber to continue in the handling of salt.

A reduction in sales to jobbers would not be beneficial to the industry unless some alternative method existed or was available for placing salt in the hands of the consumer or retailer. Alternative

channels or methods of distribution were manufacturer's salesmen, branch warehouses, and contract sales agencies. Large buyers could be contacted by salesmen, and the orders secured by such salesmen could be transmitted direct to the manufacturer, to be filled by a direct shipment by the manufacturer. Supplementing this selling method were contract distributors and branch warehouses. A wholesale distributor, with warehousing facilities, would be made the exclusive distributor of a manufacturer for a certain area, each contract distributor being required not to resell at prices under those published by the manufacturer. These distributors were not considered to be "resellers," and were able to secure salt on better terms than those given to "resellers." Since these contract distributors were considered to be agents of the manufacturer, manufacturers were not required to publish their prices or terms of sale to their contract distributors, considered to be subsidiaries or affiliates of the manufacturer. Producers were held responsible for the actions of their salesmen.

In addition to the branch warehouses and contract distributors, another type of intermediary was recognized by producers, and given concessions not allowed to "resellers." This intermediary was termed a "supply dealer" or "agent," and for his selling services he was given a commission or brokerage. He did not take title to the salt on which he was given such a commission, nor did he receive possession thereof. To all intents and purposes, he became a broker. Such agents or supply dealers were required by contract not to rebate to the buyer any portion of their selling commission or brokerage.

Another interesting development during the code period was the granting of a special discount on table salt to chain stores. This new development cannot be directly attributed to the code, though it appeared immediately following the approval of the code. This discount was ostensibly based on quantity, and was granted in addition to the carload quantity discount. Buyers capable of purchasing a hundred thousand dollars worth of table salt per year, from all sources, were allowed a ten percent discount in most sales areas. In some areas, a sliding scale of discounts was established, such as 2% for $25,000; 3% for $50,000; 4% for $75,000; 5% for $100,000; 7½% for $150,000; 10% for $250,000. At first, price lists were so worded as to exclude cooperatives buying organizations -- retail cooperatives, retailer-wholesaler cooperatives, etc. -- from the offer of discount, which was made to "a single buyer where there is one credit risk, and where there is centralized control of buying and selling, and direct control of merchandising and advertising, and to such a buyer's wholly owned subsidiaries where the payment is guaranteed by the centralized control ....." During the first few month's operation of this special discount, only seven national chains of grocery stores were listed by the Trade Association as being eligible for the discount. There is some reason for a belief, however, that this offer subsequently was made available to cooperative chains large enough to avail themselves thereof.

The fact that such a special discount was allowed to chain stores, plus the additional fact that large retailers could secure much lower prices than could small retailers, because of the large discounts for carload lot purchases which only the large buyers could make, indicates that the salt industry was not trying to protect one type of retail outlet against another. Similarly, because of the fact that restrictions were placed on the ability of smaller industrial consumers to secure bulk salt at prices much lower than those charged for packaged salt, while large industrial buyers were still permitted to purchase salt in bulk, it is evident that the industry was not concerned with the effect of its program on the relative competitive status of its buyers.

C. Potention Effects Of Program

So far, there have been discussed two major obstacles which the industry apparently considered as blocking the road to industrial recovery, and the program developed to overcome those obstacles. First, the industry attempted to reduce unprofitable bulk shipments of industrial salt, substituting therefor the sale of packaged salt, on which a greater margin of profit was possible. Second, the industry attempted to eliminate price as a competitive weapon between producers themselves, and between producers and distributors, enabling not only the maintenance of price stability, but also making possible a greater control of price levels, at least on packaged salt.

So much for the industry's conception of its problems and the general program developed to solve those problems. At this point there should be a distinction drawn between the "industry," and the component members thereof. The welfare of an industry, and the welfare of individual members of that industry, may be entirely separate and distinct -- possibly entirely irreconcilable. In the case of the Salt Industry, as in many other instances, the N.R.A. accepted as the industry a "representative" group of members thereof. The basis of representation was number of members and volume of business. The Salt Code was proposed by the Salt Producers' Association, claiming to represent well over half of the producers by number, who produced ninety percent of the total dollar volume of production. The program proposed by the code sponsors was accepted by the N.R.A. as the program best designed to promote the best interests of the industry as a whole.

In this analysis of the program of the Salt Industry, it is deemed desirable to attempt to calculate its effect on individual members of the industry, and on others affected, rather than to attempt to treat the industry as an integrated whole.

An understanding of the physical structure of the industry is necessary to this approach. The industry embraced within the definition of the code is composed of two very large producers, thirteen or fourteen medium-sized producers, and twenty to thirty small producers. Not only do the two largest members produce a considerably greater volume of salt than any of the other members of the industry, but also they both operated a considerably larger number of plants, scattered throughout various producing areas, than did other members of the industry. For years, the Morton Salt Company, one of the two largest producers, has been the price leader on evaporated salt throughout the country, and has been the price leader on both rock and evaporated salt west of the Alleghenies. Little is known regarding the activities of the other large producer, International Salt Company, which, although producing a greater total volume of salt (evaporated and rock combined) has not played such an ostentatious part in pricing and marketing policies, evidently being satisfied to permit Morton to assume the price leadership, at least in the western and middle western States. However, since international is by far the largest producer in the Eastern States, it is considered probable that its prices and marketing policies have a considerable effect on the prices and practices of other eastern producers.

Different producers followed differing distribution methods. The Morton Salt Company maintains a number of warehouses, and a large sales force scattered throughout the country. This company probably sold a major portion of its industrial salt through its own warehouses prior to the code. Other of the larger companies apparently have not depended on branch warehouses as much as Morton, but have utilized the services of contract distributors. For example, International has a contract distributor in Boston who performs a warehousing and sales promotional service for International. Apparently this contract distributor is exclusively International's as far as sales promotional work is concerned, but performs a warehousing service for other producers.

For some unexplained reason, the smaller members of the industry usually do not maintain exclusive contract distributors - that is, contract distributors who perform an exclusive sales promotional service for them. It is believed that the smaller producers have in the past relied more on independent jobbers than on contract distributors. In general, the smaller producers, and to a considerable degree the larger ones also, depend on their own efforts, or those of brokers or other selling agents, to create a demand for their products handled through contract distributors.

Warehouses and contract distributors were considered to be agents rather than customers of the producers, and the restrictions and controls applicable to independent jobbers were not applied to the contract distributors. Producers need not file prices to their own warehouses or their contract distributors, and the restriction on bulk sales to resellers did not apply to them.

A reduction in sales through independent jobbers, with a resultant increase in sales through manufacturer owned or controlled distribution agencies would probably have the effect of increasing the joint use of contract distributors. This form of centralized, cooperative warehousing might possibly be more efficient than the older system in which a large number of jobbers were competing both in sales and warehousing. The joint use of contract distributors might also have the effect of reducing cross hauling on cheaper grades of salt. This possibility is demonstrated in the following situation.

As has been stated, Morton Salt Company maintains a number of warehouses throughout the country, and these warehouses perform a warehousing service for other salt producers. For example, the Worcester Salt Company, of New York, sells certain of its higher grades of salt in the middle west and west, and utilizes the warehousing service afforded by Morton. Because of the long haul, it would not be profitable to make the necessary absorption of freight charges on cheaper grades of salt. In order that Worcester Salt salesmen and brokers might be able to offer a complete line to prospective buyers, Worcester Salt Company arranges to fill orders for cheaper grades of salt with Morton's Salt. If a buyer, for example, wishes to purchase a full carload of salt, in order to secure the carload discount, but wants only a quarter of a carload of high grade salt, the salesman takes his order for the full carload, and instructs Morton's warehouse to ship a full carload

to the buyer, filling in the required cheaper grades with Morton's Salt. The buyer is filled for the full carload by Worcester, who pays Morton for the salt supplied to fill the carload. In this manner, Morton makes a sale without effort, Worcester is enabled to offer a full line to buyers without the necessity of making an unprofitable freight absorption on cheaper grades, and everybody is satisfied.

The principal significance of this cooperative warehousing is that it emphasizes the departure from sales through independent distributors, and the substitution therefor of a direct selling program, whereby producers either distribute their products themselves, or distribute them through controlled distributors.

Since the use of contract distributors requires a considerable degree of resale activity by the manufacturer not receiving a sales promotional service from such distributors, those manufacturers capable of maintaining an extensive sales force probably would be benefited more by the increased use of such distributors than would the smaller members, not so well equipped to contact the market direct. To an unknown degree, this potential advantage is offset by the ability of the smaller members to utilize the services of brokers in place of a directly controlled sales force. Of course, those producers owning or controlling a number of warehouses, like Morton, would derive a financial benefit through the operation of a system whereby they perform, and receive payment for, a distribution service rendered by them to other producers, as well as receiving a free sales promotion service on some of their products by other producers wishing to fill out a complete line.

However, although it is impossible to estimate the direct effect on the competitive status of various members of the industry of an evolution from indirect to direct selling, the potential or possible indirect effects of such a change are of great importance.

A policy of selling through owned or controlled distribution agencies would assist in the elimination of price competition between manufacturers and distributors, which, in turn, would be an important factor in the maintenance of uniform prices from producer to consumer and the elimination of price as a competitive weapon between producers. The elimination of price competition in an industry where packaging and quality are so well standardized as in the salt industry would leave sales effort as the principal means of securing or maintaining access to the market.

The substitution of selling competition in place of price competition as the outstanding method of promoting and maintaining sales would be to the advantage of those best equipped to effectively utilize that method of competition. Those members with small sales forces, little known brand names, doing little advertising, who previously depended on independent distributors to promote and distribute their products would be at a distinct disadvantage as compared to those manufacturers having well known brand names, maintaining extensive sales forces and conducting expensive advertising programs, so long as the competition was limited to selling competition. Those producers financially unable to readily revise their distribution methods or to enter into expensive advertising campaigns would find the situation a serious one.

It should be borne in mind that the demand for salt appears to be comparatively inflexible. Increased advertising, intensified sales effort, probably contribute very little toward a total increase in the consumption of salt. If one company increases its sales, either by increased selling efforts or by reduced prices, others probably lose a comparable amount of business.

Since the larger members of the industry are better equipped to compete on the basis of selling effort, as contrasted with price, it is probable that the successful operation of the merchandising program carried on under the code would have had the result of increasing the sales of large producers at the expense of the smaller ones.

D. Actual Effects Of Code Program

There has been set forth above an analysis of the problems confronting the industry, and the program developed in an attempt to meet these problems, together with a discussion of probable effects had the program operated successfully. Some information is available as to the actual operation of the program. During the first few months of the code period, it appears that most of the members adhered to filed prices, eliminated bulk sales to resellers, discontinued the granting of brokerage to cooperative buying organizations, and generally conformed to the various regulations included in the total program.

During 1934, a few complaints of code violations developed. Some of these complaints were against deviations from published prices on the part of producers or contract distributors of producers. Difficulty was encountered in obtaining compliance with the Code Authority's regulation against the granting of brokerage commissions to cooperatives. The N.R.A. finally determined that this regulation was in conflict with Executive Orders issued by the President so far as farmers' cooperatives were concerned.

During the latter part of 1934 and the early part of 1935 devices were developed whereby jobbers were enabled to evade the restrictions which were imposed on bulk sales to resellers. Agreements were entered into between jobbers and smaller industrial consumers, whereby a consumer would place an order (either through the jobber, acting in the official capacity of "supply dealer" or "agent" -- somewhat comparable to a broker --, or direct to the producer) for a carload of bulk salt. The carload would be consigned by the producer to such consumer, but upon delivery to the railroad siding of the buyer, the jobber would unload the salt and store it in his warehouse. He would then supply to the consumer such salt as the consumer needed, selling the remainder to other small industrial consumers. This would be of advantage to the buyers, unable to handle a full carload of salt at one time, by enabling them to secure their salt at a better price than they would have to pay for packaged salt, purchased direct from the manufacturer in less than carload quantities. The jobber, of course, would furnish the money to the industrial consumer with which he would pay the manufacturer. It was difficult for salt producers to unearth instances of this means of evading the restriction on sales of bulk salt to resellers, and there is reason to believe that certain members did not particularly care whether this result obtained. No definite information is available as to the

extent of this practice, nor its total effect.

In the latter months of the code period, the practice of granting secret rebates and other secret concessions from filed prices began to develop in the industry. Filed prices were maintained at uniform levels within the various marketing areas, but actual price uniformity was disappearing. The difficulty of discovering and proving secret price concessions, plus rather apathetic support from the N.R.A. along compliance lines, contributed to the growth of secret pricing. Adherence to published prices was a vital part of the campaign for uniform prices, and the recurrence of secret pricing was an extremely serious obstacle to its success.

No information has been developed as to the actual extent of violations of the open price provision of the code. Evidently, the situation was not sufficiently serious to be called a complete breakdown of the open price provision. Comparatively few complaints were brought to the attention of the N.R.A. This may indicate either that actual evidence of code violation was not forthcoming, or that attempts were being made to persuade violators to mend their ways voluntarily.

Following May 27, 1935, deviations from published prices became more and more troublesome. By August, the secret prices evidently became sufficiently serious to warrant retaliation by the price leaders in the industry. Since that time, there has developed one of the worst price wars experienced in recent years by this industry. Published prices remain practically the same as they were during the code period, but discounts and rebates ranging from twenty to thirty percent are being granted to various types of buyers. Whether or not the severity of the present price war is to any extent attributable to an attempt on the part of smaller producers to regain business which they may have lost during the code period, or the natural result of a return to the use of any competitive weapons available, or to a psychological reaction from the restrictions imposed during the code period, is not known.

It is impossible to estimate the actual effects of the Code of Fair Competition for the Salt Producing Industry. It may be that the industry has made a permanent increase in direct sales, and that permanent progress has been made toward the substitution of packaged sales for bulk sales of salt. Certainly the existence of the present price war does not indicate that much progress has been made toward the elimination of price competition from this industry.

It appears that the level of prices was increased for the first few months of the code period, through the cessation of the secret rebates and secret concessions from filed prices which existed before, and after, the code period.

There evidently had been an increase in the use of manufacturer's selling agents or brokers as a result of the operation of the code, but whether this increase is a permanent one, or whether there will be a complete reversion to the use of jobbers and dealers as such, is a matter of conjecture.

The large number of complaints from jobbers to the effect that the code restrictions were making it impossible for them to profitably handle salt indicates that the code was of assistance in the elimination of jobber middlemen from the handling of industrial salt (except those distributors under contract requiring resale price maintenance), or so limiting the differential to jobbers that they could profitably retain only that type of business which the producer could not handle through direct sales, placing him in a position where he could not interfere with the price structure of the manufacturers, or participate in the carload market.

Of the two distinct phases of the industry's program -- first, the reduction of bulk sales and increase of packaged sales of industrial salt, with resulting opportunity for greater profits on sales to smaller buyers; and second, the elimination of price competition -- the first appears to have been the more successful. Although some buyers found means of circumventing restrictions on bulk sales, it is doubtful if all of them were successful in this direction.

E. Evaluation of the Code Program

For more than twenty years, through trade association activity, and later under the code, attempts have been made to stabilize prices and place less emphases on price as a method of competition than on advertising, service, and other forms of selling effort. It appears that more progress was made in this direction prior to, than during the code, including the division of the country into recognized marketing areas; establishment of a basing point system; recognition of the principle of sales on the basis of published prices; elimination of open or published trade discounts to jobbers.

The failure of the code to operate with complete success may be attributed to two factors. First, the code attempted to accomplish those things which had been found most difficult of accomplishment in the association program which had been supported for many years by the industry members later sponsoring the code. Second, inherent in this program was a major obstacle to its successful operation. Although the program was potentially capable of increasing profits for the industry as a whole, yet it was so designed as to enable only certain members to participate in those profits. An attempt was made to change from the use of price as the predominant weapon of competition, to the complete elimination of price, and the substitution therefor of selling competition.

Inevitably, this would be to the disadvantage of those members unable to effectively compete on the new basis, and these members, rather than face certain extinction, would naturally persist in reverting to a basis of competition, which, although perhaps not more satisfactory to them ultimately, at least might permit their survival for a longer time than under the new basis.

It is entirely possible that, whether the principal basis of competition be price or selling effort, the same producers would be best equipped to survive - the larger, wealthier members.

For a period of more than thirty years, the number of producers in this industry has steadily declined. It is probable that ultimately, the smaller producer is no better off under a program wherein open price competition exists than under one where there is no price competition. In this industry, as in other where overhead cost is a very important element of cost, there is a strong incentive to increase volume thereby materially decreasing per unit cost production, with the hope of realizing a greater net profit. Because the total demand for salt is relatively inflexible, the total consumption probably is increased very little as a result of price reductions, and any increase in volume gained by one producer as a result of reduced prices would result in a similar reduction in the volume of sales of other producers. Other producers would be compelled to meet the price reduction in an effort to maintain their volume, and the result would be that all producers would retain their relative volumes, but would be selling at a reduced, and possibly unprofitable level. The producers able to continue to operate unprofitably for the longest time will survive, while the weaker perishes.

The principal differences between the two bases of competition - completely free price competition versus selling competition-- are, first, that in the latter case, the competitive struggle is conducted on a higher price level, and the members best equipped to survive could maintain or better their position without the expense incident to a long price war; and second, that the demise of the weaker members might be deferred longer when price is the principal base of competition.

There has never been evident in this industry (so far as information available to this study discloses) any willingness on the part of the large advertisers to openly allow the small or non-advertisers a price differential, thus balancing the appeal of price by the appeal of advertising. Price reductions, when open, evidently have always been met by other producers. Emphasis on price is entirely capable of causing, and in fact has caused, price wars in which prices become so low as to cause all members of the industry to sell at a loss. Those members of the industry with the longest pocketbooks -- the greatest cash reserves -- are the ones best able to survive such price wars.

It is interesting to speculate what might have been the result had the industry made the attempt, not to completely eliminate price competition and substitute therefor selling competition, but to give equal prominence to both means of seeking access to the market - by permitting the non-advertisers to sell for prices slightly below those of advertisers; by giving those not as well equipped to render a distribution service to buyers a slight price advantage over those better equipped to render this service. If a differential could be developed which would be satisfactory to the various types of producers, tending to rigidify the relative positions of the different members, a program of price stabilization might be more feasible administratively than the one undertaken.

Any program of price stabilization, of course, is subject to the valid criticism that the interests of the consuming public are entirely overlooked, the sole purpose sought to be accomplished being the protection or enhancement of the profits of the industry. From a public viewpoint, the benefits to be gained through the successful operation of any price stabilization program, in which the public has no voice, are apt to be outweighed by the cost thereof to the public.

For example, the refusal of the members of the industry to allow brokerage payments to wholesale farmers' cooperatives, who would in turn pass the discount on to their members, plus refusal to make bulk shipments to small buyers and resellers, thus requiring farmers to buy packaged salt at considerably higher prices than they had been paying for bulk salt, doubtless benefited salt producers by increasing the amounts received for salt sold to farmers. However, the adverse effect on the farmer might readily be considered more important than the beneficial effect on salt producers in an appraisal of the desirability of the program from the public viewpoint.

Furthermore any program which, like the one adopted by the Salt Industry, is based on price discrimination between large and small buyers is open to severe criticism, particularly when the price differential between these classes of buyers is very large. As has been stated earlier in this report, the program of this industry evidently contemplated an increase in prices to small industrial buyers, unable to protect themselves against such increase, at the same time permitting large industrial buyers to purchase their salt at a price considerably lower than that charged small buyers, since the large buyers were better able to protect their interests by entering into the production of salt to meet their requirements.

Small industrial buyers, incapable of buying a full carload of industrial salt, were required to purchase packaged salt, and were refused the privilege of buying bulk salt in pooled cars. Large industrial buyers were given a carload discount, an opportunity to secure a further discount by entering into a contract calling for the purchase of large quantities of salt over a period of a year, and were permitted to purchase salt in bulk, at a considerably lower price than that which the l.c.l. buyer was charged for packaged salt.

Much the same situation prevailed with respect to table salt. Large grocers, capable of buying in carload lots, could secure a carload discount ranging up to 13%. However, national chain stores, in most marketing areas, could secure an additional 10% discount, granted to resellers large enough to purchase $100,000 worth of salt per year, from all sources. Thus, chain stores could buy salt for a price as much as 28% below that which small, independent grocers, were required to pay. The total price differential between the large and small buyers of both kinds of salt was considerably greater than is easily justified on the basis of any saving in cost to the seller.

If the analysis herein made of the objectives sought to be attained through this industry's attempted control of distribution, is an accurate one, it certainly would not appear that the proponents of the program were greatly concerned over the protection of small enterprises engaged either in the manufacture or distribution of salt.

APPENDIX IV.

Foot-Note References and Citations.

1. Complied from a statement presented to the National Recovery Administration by the Salt Producers' Association, pp. 4-12, Vol. 1, Transcript of Hearing, August 14, 1933; publications issued by the U. S. Bureau of Mines, including issues of Mineral Resources and the Minerals Yearbook; and Volumes A and B, Salt Producing Industry Code, Code Record Section, N.R.A.

2. 1934 Minerals Yearbook and a galley proof of the Salt Section of the 1935 Minerals Yearbook, U. S. Bureau of Mines.

3. "Production and Distribution of Salt in the United States by Primary Producers", U. S. Tariff Commission, 1935.

4. "Salt, Its Romantic History, Its Refining and Its Many Uses", published by the Worcester Salt Company, New York, 1933.

5. Interview with Mr. H. C. Mandeville, President, Worcester Salt Company, New York City, January 9, 1936.

6. Information contained in the 1934 Minerals Yearbook, U. S. Bureau of Mines, with the exception of the number of plants owned or controlled by International Salt Company. The Minerals Yearbook indicates that International owns or controls five plants; price lists issued by International contain the names of six plants operated by that company.

7. 1934 Minerals Yearbook, U. S. Bureau of Mines.

8. Moody's Industrial Service, 1932.

9. Letter from the President of the Salt Producers' Association to the National Recovery Administration, July, 1933; questionnaire filled in by the Secretary of the Salt Producers' Association; both of which appear in Volume B, Salt Code, Code Record Files.

10. Volume B, Salt Code, Code Record Files.

11. Docket 781, Federal Trade Commission.

12. By-Laws of the Salt Producers' Association, Volume B, Salt Code, Code Record Files.

13. "Railways in the United States, 1902, Part II, Changes in Freight Tariffs", Interstate Commerce Commission, 1903.

14. PP. 53-57, Transcript of Public Hearing, Salt Industry, August 14, 1933, Statement of Mr. Daniel Peterkin, Morton Salt Company.

14a. PP. 54-55, Transcript of Public Hearing, Salt Industry, August 14, 1933, Statement of Mr. Daniel Peterkin, Morton Salt Company.

15. Price List Files, Salt Folder, Open Price Unit, Trade Practice Studies Section.

16. Deputy's Files, Brokers Folder.

17. Deputy's Files, Code Authority Folder.

18. Article IV, (a), (b), Salt Code.

19. Article IV, (a), Salt Code.

20. Article IV, (e), 2, 6.

21. Deputy's Files, Code Authority General Folder.

22. Deputy's Files, Meeting Folder

23. Deputy's Files, Cooperative Folder.

24. Deputy's Files, Quantity Discount Folder.

25. Deputy's Files, Protest Folder.

26. Deputy's Files, Complaints Folder.

27. Salt Producing Code, Article IV, Sec. (e), paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 16.

28. Page 90, Volume II, Transcript of Public Hearing, Salt Industry, August 14, 1933.

29. Distribution of Sales of Manufacturing Plants, Fifteenth Census, published by the Bureau of the Census in 1932.

30. Deputy's Files, Interpretations Folder.

31. Public Agency Division Files, Drawer 4, Cooperatives Folder.

32. Interview with Albert P. Ames, owner of A. P. Ames Company, Peabody, Massachusetts, January 8, 1936.

33. Deputy's Files, General Code Folder.

34. Volume 1, Page 4, Transcript of Public Hearing, Salt Industry, August 14, 1933.

35. The information contained in pages 98-100 inclusive was developed in interviews with a salt producer and distributors of salt. The distributors requested that their names be not divulged.

36. This information was secured under a pledge of confidence as to source.

TABLE NO. 1

Production of Salt By States

	EVAPORATED				ROCK				TOTAL			
	1933		1934		1933		1934		1933		1934	
	Tons	Value	Tons	Value	Tons	Value	Tons	Value	Tons	Value	Tons	Value
California	323	$1,985	333	$1,987	(1) 8		(1) 9		331	$2,019	342	$2,026
Kansas	286	2,076	277	1,336	(1) 447		(1) 491		733	3,039	768	2,950
Michigan	730	4,314	722	4,024	*140		*245		2,090	5,680	2,012	5,471
New York	356	3,335	345	3,345	*475		*500		1,858	5,121	1,866	5,263
Ohio	334	2,046	333	2,136	0		0		1,382	2,599	1,432	2,721
West Virginia	64	329	63	406	0		0		64	329	*67	*334
Louisiana	No figures on evaporated salt				*500		*525		533	2,345	567	2,855
Texas	"	"	"	"	No information on rock salt				166	560	209	613
Utah	"	"	"	"	"	"	"	"	56	141		
Others	196	979	204	1,009	*215		*143		402	435	343	568
Total	2,359	$15,064	2,281	$15,771	1,785	$5,570	1,913	$6,306	7,605	$22,313	7,612	$22,851

(a) Mineral Yearbook, 1934 - Ohio, Mich., N. Y., Va., and W. Va. produced brine in 1933.

(b) Louisiana, N. Y., Kans., and Mich. (in order named) produced 92% of all rock salt in 1933 and 1934.

(1) Rock salt production figure estimated by subtracting evaporated salt figures from total production. States of Kansas and California produce no brine. (See footnote (a)).

(*) Estimated. Louisiana is largest producer of rock salt, yet produces some evaporated salt. It produces more rock salt than does Kansas. New York produces more rock salt than Kansas, though less than Louisiana. Louisiana, N. Y., Kansas, and Michigan produced 92% of all rock salt (see footnote (b)), so it is possible to approximate production of each of the states, using Kansas as the basis for the calculation.

TABLE NO. 2.

Salt Production and Value Per Ton
(Compiled from Mineral Year-
books of the U. S. Bureau
of Mines.)

	ROCK SALT		EVAPORATED SALT	
	Tons (000)	Value Per Ton	Tons (000)	Value Per Ton
1920	1,610	$4.30	2,410	$8.60
1921	1,473	4,50	1,931	8.75
1922	1,947	3.80	2,277	8.10
1923	2,104	3.70	2,240	8.25
1924	2,065	3.60	2,225	7.50
1925	2,343	3.15	2,235	7.60
1926	2,136	3.35	2,198	7.20
1927	2,144	2.90	2,263	7.30
1928	2,218	3.05	2,430	7.30
1929	2,113	3.35	2,546	6.95
1930	1,977	3.40	2,359	7.40
1931	1,854	3.05	2,204	6.50
1932	1,585	3.15	2,053	6.50
1933	1,785	3.10	2,359	6.40
1934	1,920	3.30	2,290	6.40

List No. 1

SALT PRODUCERS ASSOCIATION

Office of Secretary

Book Building Detroit.

BULLETIN

September 19, 1933.

TO ALL SALT PRODUCERS:

NATURAL MARKETING TERRITORY

The Code Committee has defined the present natural marketing territory for each producing field to be as follows:

NEW YORK

New York	New England
New Jersey	Maryland
Delaware	Dist. of Columbia
Pennsylvania (except Star Points Accomac and Northampton Counties)	Virginia

OHIO

Ohio	West Virginia
Pennsylvania Star Points	Kentucky Star Points
Virginia (except Accomac and Northampton Counties)	

MICHIGAN

Michigan	Wisconsin
Illinois	
Indiana (except New Albany and Jeffersonville)	
North Dakota (except Star Points)	

MICHIGAN-KANSAS

Iowa	Minnesota
South Dakota	No. Missouri
North Dakota Star Points	

KANSAS

Kansas	Colorado Star Points
So. Missouri	Wyoming
Nebraska	New Mexico

OKLAHOMA

Oklahoma

Arkansas: That part of the State which is North of the South boundary line of the following counties:

List No. 1 (Continued)

Polk, Scott, Yell, Perry, Faulkner, White, Woodruff, Cross, Poinsett and Mississippi.

TEXAS Texas

UTAH
Idaho (except Northern part)
Montana
Wyoming (except Star Points)
Nevada (except Western part)
Utah
Colorado (except Star Points)

CALIFORNIA
California
Oregon
Nevada - Western Part
Idaho - Northern Part

Arizona
Washington

LOUISIANA
Louisiana
Mississippi
Alabama
Georgia
Florida
South Carolina
North Carolina
Kentucky (except Star Points)
Jeffersonville and New Albany, Indiana

Tennessee
Arkansas: That part of the State which is South of the South boundary line of the following counties: Polk, Scott, Yell, Perry, Faulkner, White, Woodruff, Cross, Poinsett and Mississippi

FRANK MORSE
Secretary of the Code Committee

List No. 2

(List of Salt Producers, By States; type of salt produced, and affiliations or ownership.)

Compiled from 1934 Minerals Yearbook, U. S. Bureau of Mines.

STATE	PRODUCER	NO. OF PLANTS	TYPE OF SALT	OWNED BY OR AFFILIATED WITH
California	Leslie-California	2	Evaporated	
	Long Beach	2	Evaporated	
	Morton	1	Evaporated	
	Arden	1	Evaporated	Morton refines salt produced by Arden.
	Sierra Salt	1	Evaporated	
	Surprise Valley	1	Evaporated	
	Monterey Bay	1	Evaporated	
	Calif. Rock Salt	1	Rock	
	Saline Products	1	Rock	
	Burnham Chem. Co.	1	Evaporated	Chemical Company
	Western	1	Evaporated	
	Stauffer Chem. Co.	1	Evaporated	Chemical Company
Kansas	Carey Salt Co.	2	Evaporated & rock	
	Independent	1	Rock	Meat Packers
	Crystal	1	Rock	
	Anthony	1	Evaporated	
	Barton	1	Evaporated	
	Morton	1	Evaporated	
	American	1	Evaporated & rock	
	Diamond Crystal	1	Evaporated & rock	General Foods Corp.
Louisiana	Avery Salt Co.	1	Evaporated & rock	International Salt Company
	Jefferson Island	1	Evaporated & rock	
	Myles	1	Rock	
	Carey	1	Rock	
Michigan	Morton	3	Evaporated	
	Diamond Crystal	1	Evaporated	General Foods Corporation
	Detroit Rock Salt	1	Rock	International Salt Company
	Manistee	1	Evaporated	
	Dow Chemical Co.	1	Evaporated	Chemical Company
	Mershon, Eddy, Parker	1	Evaporated	
	Saginaw	1	Evaporated	
	Strable Lumber & Salt	1	Evaporated	
	Solvay Process	1	Brine	Chemical Company
	Michigan Alkali	1	Brine	Chemical Company
	Pennsylvania	1	Evaporated & brine	Chemical Company

Nevada	Virgin River	1	Rock	
New Mexico	New Mex. Salt Co.	1	- - - -	
New York	Retsof	1	Rock	International Salt Company
	International	2	Evaporated	"
	Watkins	1	Evaporated	
	Worcester	2	Evaporated	
	Solvay Process	1	Brine & evaporated	Chemical Co.
	Cayuga Rock Salt	1	Rock	
Ohio	Union	1	Evaporated	
	Colonial	1	Evaporated	
	Ohio Salt	1	Evaporated	
	Diamond Alkali	1	Brine & evap.	Chemical Company
	Pittsburgh Plate Glass	1	Brine	Chemical Company
	Excelsior	1	Evaporated	
	Pomeroy	1	Evaporated	
Oklahoma	Texaco	1	Evaporated	Texas Products Company
Texas	Morton Salt Co.	1	Evaporated & rock	
	Palestine Salt & Coal	1	Evaporated	
	United	1	Rock	
Utah	Royal Crystal	2	Evaporated & rock	
	Morton	1	Evaporated	
	Great Western	1	Rock	
	Poulsen Bros.	1	Rock	
W. Va.	J. Q. Dickinson	1	Evaporated & bromine	
	Westvaco Chlorine	1	Brine	Chemical Company
	Liverpool	1	Evaporated & bromine	
	Ohio River	1	Evaporated & bromine	

Chapter II*

THE WOOD-CASED LEAD PENCIL MANUFACTURING INDUSTRY

I. DESCRIPTION OF INDUSTRY AND ITS PROBLEMS

The Wood Cased Lead Pencil Industry, as defined by its code, consisted of 13 firms. Of these, four firms which have been in business for more than 50 years, have long held a leading position in the industry, together accounting for a substantial majority of the total volume of the industry, and being familiarly known throughout the industry as the "Big Four". At the time the code was adopted, each of the "Big Four" firms accounted for at least 15% of the total volume of the industry. However, their combined percentage of the total business had been declining for several years, from 80% in 1927 to 76% in 1930, to 72% in 1932, and to 66% in 1933. **

From 1913 to 1927, when the industry volume reached its peak, the increase in volume was quite consistent with population increase, the volume running roughly six pencils per person per year. However, starting after the peak year of 1927, the industry suffered a downward volume trend, so that by 1932 the total industry volume was down about 50% from its peak. ***

This decline in volume was laid largely to the competitive advance in the writing instrument field of mechanical pencils, fountain pens, statistical and bookkeeping machinery, etc., as the decline started before the depression in 1929. ****

During the period of volume increase from 1921 to 1928, several new production units entered the industry, which units began to compete for sales volume on the basis of lower selling prices. From 1928 on, as volume commenced to decline, there began a competitive contest for sales volume, which, according to code proponents, had two outstanding characteristics - price cutting and cheaper goods which copied the appearance of the higher priced numbers. The code proponents consistently pointed out the importance of the yellow pencil as having been accepted as the five cent pencil by popular consumer opinion, and raised strong objection to the use of this color in cheaper pencils." *****

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* This Chapter was written by Arthur A. Kimball

** See Appendix, Exhibit No. 3, pages 422,,424 and 428..

*** Ibed.,page 423.

**** Ibid.,Page 423.

***** Ibid.,pages 423, 424 and 448 to 451

From the best available information, the highest average price per gross was reached in 1920 - $3.25 per gross. From 1920 on, the average price per gross declined steadily, reaching $2.47 in 1929, and only $1.86 in 1932, at which time it amounted to but 30% of its peak. The code proponents further estimated that the industry suffered a financial loss amounting to $1,000,000 in 1932, and that in view of the anticipated increase in labor costs under the code, and in spite of the impossibility of regaining a sales volume anywhere near that of the peak year, it was necessary to increase the gross income, which could only be accomplished by raising the price average.*

In addition to the reasons mentioned above for declining sales volume - advance of other writing instruments, price competition from new members of the industry, and the depression - a recent added factor at the time the code was proposed was the great increase in low-priced Japanese imported pencils. (This factor does not have much relation to the subject studied, but is mentioned in order to present a complete "picture".)**

In addition to the "Big Four", there were two firms (Class B) which each accounted for more than 5% of the total sales volume, and seven firms (Class C) which each accounted for less than 5% of the total volume.. In 1929, the Lead Pencil Institute, Inc. (the code sponsoring trade association) was founded. At the time the code was originally presented, the Institute consisted of 11 members out of the 13 firms in the industry. However, one of these members withdrew from the Institute and joined the group opposing the code. ***

Three small (Class C) manufacturers consistently opposed the code, all of them being non-members of the Institute. All of these firms were newcomers in the industry - two had been in business for three or four years, one for but a few months. This group, which will be referred to herein as the "code opponents", consistently charged that the code was an effort by the "Big Four" to gain an even greater monopoly, and by forcing these small manufacturers out of business, to regain their position in the industry's total sales volume which they had lost to these new firms in recent years. It will be noted in later pages that certain charges of the code opponents which seemed to have considerable merit, brought forth no proper defense by the code proponents, as far as available N.R.A. files are concerned. ****

The code opponents charged that other smaller members of the industry were owned outright, dominated or controlled by the "Big Four"; that the "Big Four" named every member of the Code Authority, not only those representing Class A manufacturers. *****

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* Ibid., pages 423 and 467.
** Ibid., pages 432 to 434
*** Ibid., pages 423, 424, 454 and 455.
**** Ibid., pages 424, 429, 445, 446, 448, 449, 452, 474, and 507.
***** Ibid., page 424.

Certainly, with the exception of one Class B manufacturer, little code proposing or administrative activity was recorded concerning these small manufacturers who were among the code proponents. Rather, the names appearing on behalf of the code proponents, with the exception of the paid officials of the Code Authority and Institute, were generally members of the "Big Four". With this charge and information in mind, it is pointed out that certain charges of oppression by the code opponents, and by the Darrow Review Board, were answered by the code proponents simply by the statement that other small manufacturers were not protesting.*

On the other hand, the code proponents charged that the two older of the code opponents had interlocking directorates, and were set up as a "straw man" by a large chain store organization to beat down the price of other other manufacturers. The chain store business was stated to be the most important factor in the pencil trade, and was of great importance to one member of the "Big Four" in particular, who lost some of this volume to one of the code opponents.**

In addition to the 13 firms mentioned above as comprising this industry, four other firms tried hard but unsuccessfully to be admitted under the code as members of the industry. These four firms, which will be referred to herein as the "importers", imported certain leads and materials in this country, and then turned these materials over to other firms which by contract fabricated and assembled these materials into pencils bearing the name of the "importer" concerned. The title to the materials and to the finished pencils remained in the "importer" during this entire process.***

A great deal of the time at the hearing was devoted to the controversy concerning this petition for code membership. The code proponents strenuously objected to their admission, stating that they were not manufacturers under the definition made by the Federal Trade Commision, and thus had no place as members of the industry. The "importers" stated that they were members of the industry, but not of that narrow part of the industry defined by the code; that they were not anxious to be admitted to code membership if the code had no effect on them, but that the code did seriously affect their interests and that the Institute intended to attempt to regulate them as "sales agents" of manufacturers, (which it will be seen later was attempted by the Code Authority) without giving them the right to representation and participation in the code authority and its activities. (It might be noted that certain other N.R.A. codes, such as the codes for the Merchant and Custom Tailoring Industry and the Handkerchief Industry, did admit as members of the industry firms which had their merchandise manufactured for them by contract. Certain industries considered it more wise to gather under their codes all types of firms with related problems,

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* Ibid., pgs. 477 and 506.

** Ibid., pgs. 427 and 429.

*** Ibid., pgs. 429 and 430.

rather than leaving out of the code and apart from its direct regulation certain firms which in some cases from the point of the view of the whole industry, most needed regulation.) However, the code as approved did not include these "importers" as members of the industry. (*)

As for a description of the methods used in distributing the goods of this industry: The code as proposed and approved made no distinction between wholesaler and retailer, both types of outlets being designated as "dealers". The code sponsors stated that the strict wholesaler had practically disappeared in this industry and that it was not practical to distinguish between wholesaler and retailer or to give the wholesaler a special price differential; that many dealers combined both wholesale and retail functions; that there were large and small retailers. some large retailers such as mail order houses, chain stores and five and ten cent stores, handling a much larger volume than most wholesalers. Thus, as will be seen in later pages, the code provided the same terms and discounts for all "dealers," regardless of their function, with certain price recognition on a volume basis. (**)

In addition, the manufacturers themselves sold direct to large industrial consumers, the code providing special discount schedules for this type of customer. It is quite likely that this type of sale was more within the field of the large manufacturers with ample, well-trained sales forces, than the field of the smaller manufacturers who probably had to rely more on dealers for the distribution of their products. (***)

The code was supported by many individual wholesalers and by their principal association, although this association wished the code to be more restrictive concerning small volume direct sales to consumers.(****) However, certain individual wholesalers wrote letters opposing the marketing rules proposed for the code. Inasmuch as one of these wholesalers indicated that his active support of the code had been solicited by one of the large manufacturers, and that while other wholesalers might advocate approval of the code without realizing its disasvantages, he desired to register strong protest against it, the value of the general supporting requests of certain wholesalers may be questioned by the reader. (*****)

The code also received the support of individual retailers and the association of commercial stationers. On the other hand, it was strongly opposed by certain retail associations, which represented mail order houses,

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(*) Ibid., pgs. 130 to 432, and 456 to 463.

(**) Ibid., pgs. 464 to 465.

(***) Ibid., pgs. 452, 464, 465, 469, 481 and 434 to 486.

(****) Ibid., pgs. 139 to 441, 487, 489, etc.

(*****) Ibid., pgs. 482, etc.

five and ten cent stores, department, dry goods and specialty stores.*

The above channels of distribution were limited to standard pencil brands and special advertising imprints. An entirely different channel of distribution was used for blank pencils (pencils bearing no printing, but to be imprinted for advertising purposes), according to the code proponents, who stated that through custom in the industry this type of pencil was handled only by a special type of outlet which had come to be designated by the term "distributor". Whether such a restrictive channel of distribution had existed for blank pencils prior to the code, or whether the proponents in truth were attempting to establish such an exclusive channel through the use of the code provisions, is not entirely clear from available records. Some evidence contrary to the statements of the code proponents is found in the records, and frequently letters from wholesalers termed themselves as "distributors", rather than reserving that term for the special meaning which the proponents stated custom had earned for it.**

The code proposed by the Institute contained many trade practice provisions and marketing rules, each provision being designed to do its share in carrying out the complete program of the proponents. Certain of the provisions in the code, while other provisions were suspended by the Administrative Order approving the code. Without these suspended provisions the program of the Institute was made ineffective, and possibly certain of the remaining provisions worked to the disadvantage of the code proponents. In any event, after trying hard to have the suspended provisions reinstated, the Code Authority (nine months after approval of the code) requested and obtained the suspension of a number of other provisions (including a standard provision which barred price discrimination between customers of the same class), until such time as the provisions originally suspended were reinstated.***

Therefore, it is not possible to determine the actual results of the Institute's elaborate marketing regulations, although statements and charges made by both sides, as referred to later, do show the results which the proponents expected or hoped to attain.

A large part of the code provisions directly or indirectly were aimed at the stabilization of prices in the industry, not only in an effort to raise the price average (frankly admitted by the proponents), but, according to the code opponents, to ward off or eliminate the new products which were competing on a price basis. Other provisions, which from unrefuted charges seemed to have the same purpose and probable effect, were not connected with prices, but were seemingly aimed at certain merchandising methods necessary to the foothold of these smaller concerns. Undoubtedly,

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(*) Ibid., pgs. 441, 442 , 451, 475 to 476 etc.

(**) Ibid., pgs. 456, 481, 503 etc.

(***) See Chart A, pages 319-325, and Appendix, Exhibit No. 3, pgs. 431, 467, etc..

for a single and small industry, the number of trade practice and marketing provisions was outstandingly large for N.R.A. codes, covering to a surprising point of detail, various phases of distribution and marketing. Not only were the members of the industry placed under restrictions, but the code attempted to go further and place restrictions on dealers and others who were not members of the industry.*

II CODE MARKETING PROGRAM

The program of the code proponents, as shown by the various code provisions proposed and approved (without regard at this time to their final status) and action taken under these provisions, might be sketched as follows:

A. Allocation of Production.

The proponents sought to allocate production of industry products upon the basis of volume in the past three years, the "Big Four" stating that this was at the request and for the protection of the small manufacturers. This may be questioned when the recent inroads of the small manufacturers who opposed the code are considered; rather, it may have been for the purpose of preventing further volume advance by these newcomers. More credence may be given this latter thought after considering one unrefuted charge by the code proponents. This Article on production control contained a provision prohibiting manufacturers from installing new shaping machinery (which shapes the unfinished pencil - necessary in pencil production) until the industry's existing shaping machinery was used continuously for six months at 80% capacity. The code opponents charged that three of the "Big Four" had recently moved considerable production to Canadian factories, creating idleness in their domestic machinery to that extent; that the "Big Four" wished by this provision to prevent the expansion of small manufacturers until this excess domestic production capacity was in use again. A further charge, made in another connection, may be pertinent, it being claimed that the "Big Four" doubled their production capacity during the war, to an extent unwarranted, so that following the war they had considerable excess capacity, with its resultant expense. At any rate this provision was eliminated from the code after the public hearing.**

B. Standardization and Simplification.

The code provided that if simplified practice recommendations were approved for this industry by the Bureau of Standards of the U. S. Department of Commerce, such standards should become binding upon all members of the industry. Proposals for standardization of industry products are generally considered innocuous and a step in the right direction, and as such would not be of interest in such a study as this. However, it was charged that the standards proposed in this case were for the two-fold

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(*) See App., Exhibit No. 3, pgs. 423,424,445, 446, 448, 449, 452, 467, 474, 507.

(**) Ibid., pgs. 444 to 446.

purpose of providing a basis for the price structure and to eliminate numbers of particular importance to the code opponents, so that the subject is of interest as an integral part of the Institute's program, if such charges are true.*

Throughout the record of this industry's code activities the importance of the yellow, five cent pencil was stressed by the proponents. They stated that this yellow color had become impressed on the public's mind as indicative of the five cent quality pencil, and that the inroads made by the code opponents were largely due to the fact that they produced and marketed pencils which were inferior in quality and cheaper in price, but identical in appearance to the standard five cent pencil. Therefore, the proponents were determined in their effort to limit the use of this color to the five cent pencil. The simplified practice recommendations for the industry as eventually approved by the Bureau of Standards evidently did so restrict the use of the yellow color, for the records show a later request of the Code Authority for suspension of this restriction on the ground that the code opponents had obtained an unfair advantage by obtaining large advance orders for cheaper yellow pencils prior to the adoption of the standards.**

On the other hand, the code opponents charged that this was merely an attempt to eliminate them from business by taking away from them the right to use any attractive colors on their pencils; that their business was almost exclusively in pencils priced at less than five cents; that their pencils which sold at less than five cents were equal in quality to the five cent pencil of the "Big Four"; that the difference in cost between a five cent pencil and a cheaper pencil was negligible.***

C. Price Stabilization.

The code contained several provisions (some of which were suspended) which were designed to play a part in effecting stabilization of prices in the industry. It was stated by the code proponents that such stabilization would have effect only in the distributive channels, where it was sorely needed to provide a living margin to dealers and manufacturers alike, but that it would not raise prices to consumers, who were protected by their habit of buying pencils in terms of fractional currency - one cent, two for five cents, five cents, etc. (This was questioned by the Consumers' Advisory Board, which pointed out that this buying habit did not protect the industrial consumers and others who customarily bought pencils by the gross or larger quantities. The code proponents answered this charge by merely stating that these consumers were protected also, as the prices on larger quantities were regulated by the price of the single pencil. However, no definite reasons for assurance of such protection were given. Furthermore, it is doubtful that either type of consumer was thus protected by this stated buying habit, for in buying pencils at certain prices he might obtain lower quality than formerly as a result of the

(*) Ibid., pgs. 444 to 446.

(**) Ibid., pgs. 444 to 446, and 467
(***) Ibid., pgs. 444 to 446, 476, 477, 478, 479, etc.

cost of such price stabilization - a point that is not brought out at any point in the records which were studied.*

The code contains provisions permitting manufacturers to provide for resale price maintenance through contracts with dealers (which the dealers would have to make in order to handle the goods), and providing for enforcement of such resale price maintenance throughout the entire distributive channel through the use of boycotts in the form of unfavorable price differentials for offenders. (These provisions, however, were suspended at the time the code was approved.) Furthermore, in the code originally proposed by the Institute were provisions prohibiting sales to dealers who violated resale price maintenance agreements, or who used certain merchandising practices such as "loss leaders", premiums and prizes. (These provisions were deleted before approval of the code.)**

(*) Ibid., pages 437 to 438, 464 to 468, 466, 469 to 471 473 to 474. to .

(**) Ibid., pages 463, 464, 503 etc.

The Code provided for open price filing, which filing was mandatory upon all members of the industry. Revised prices could be filed, all filed prices becoming effective immediately upon filing. (The original proposal provided that prices filed should not become effective for at least 15 days, but this provision was changed due to criticism to the effect that this would promote collusion among manufacturers as to prices.) With the filed prices were required to be included the members's standard terms and discounts, so that the actual net price of any transaction could be readily determined. It was further provided that no member could sell on a more favorable basis than provided by his filed prices.*

The code further provided in connection with such price filing, that fair minimum prices of products retailing at five cents or less, could be determined by the Code Authority with the approval of the Administrator, and that after such minimum prices were approved, the Code Authority should reject any price list which did not conform to such minimums. The fact that the minimum price provision was limited to pencils retailing at five cents or less is interesting in view of the statement by the code opponents that 95% of their volume was in pencils which retailed at less than five cents and that they made no pencils which retailed at more than five cents, which the great bulk of the business of the "Big Four" was in pencils which retailed at five cents or more. It should also be noticed that one large variety chain charged that the code efforts were directed chiefly against pencils in the lowest price brackets.**

This minimum price provision caused a great deal of controversy and brought forth the charge from the code opponents that the code authority intended to use it in a manner which would eliminate their products.

Shortly after the approval of the code, the code authority issued a minimum price schedule as authoritative, which they stated had the written and oral approval of the Deputy Administrator. This schedule, of course, had to be retracted and subjected to later official consideration, leading to an official decision.***

However, the code opponents made the unrefuted charge (citing specific examples) that the proposed schedule singled out their leading items and placed a prohibitive minimum price upon them, while placing very advantageous minimum prices upon the leading items of the "Big Four".**** Several months after the approval of the code, the code

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(*) Ibid., pages 427, 463, 467, etc.

(**) Ibid., pages 424, 467, 476,477, 479, 480, etc.

(***) Ibid., pages 468, 469, 476 to 479.

(****) Ibid., pages 476 to 479.

authority's proposed minimum price schedule was considered at a public hearing. This schedule was drafted in two parts - one for sales to dealers and one for direct sales to consumers - which was obviously an effort by the code authority to provide the differential which had been lost through the suspension of discount provisions which established such differentials, although the code authority attempted to justify such separate schedules as necessary and intended by the language of the code provisions. However, the code authority refused to submit data in justification of their proposed minimum prices, or of an emergency requiring the establishment of minimums, claiming that no further justification beyond the approved code provision was necessary, so the proposed minimum price schedule was eventually officially disapproved (after first having been recommended for approval by the Deputy Administrator.)*

The open price filing and minimum price provisions were approved originally, but after the code authority failed in its effort to have their minimum price schedule approved, or to have the provisions which were originally suspended reinstated, these provisions were among those which were later suspended at the request of the code authority.**

One other charge of the code opponents should be particularly noted at this point in connection with the Institute's effort to establish minimum prices and an otherwise stabilized price structure.

The code opponents, smaller and newer members of the industry, not having funds for advertising upon a wide scale, relied upon price appeal as the available method of competition with the older, well-known brands. They stated that they were able to sell at lower prices than the "Big Four" for several reasons: (1) They did not have the costly advertising expense of the larger manufacturers; (2) they did not have large executive salaries as did the "Big Four"; and (3) that they did not have costly excess production capacity, which the "Big Four" did have due to unwise expansion at the time of the War. The code opponents stated that their existence depended on their price appeal, for otherwise they could not compete with the better-known brands, so that equalization of prices (whether or not linked with standardization and even without having their prices set at a higher level than those of the "Big Four" would eliminate them from the industry - thus accomplish a purpose of the "Big Four."***

The code opponents stated further that their pencils which retailed at less than five cents were equal in quality to the much heralded five cent yellow pencil of the code proponents, which pencil was sold at that price due to the heavy expenses of the code proponents. Thus, the code opponents linked the standardization program to this contemplation of

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(*) Ibid., pages 476 to 477, 481, 484 to 486.

(**) Ibid., page 430 etc.

(***) Ibid., pages 427, 477 to 480, 507, etc.

equalized prices, stating that through such standardization the code proponents hoped to reserve to pencils selling at five cents or more, yellow and other attractive colors.*

The only refutation of these charges which was made by the code proponents was to the effect that the pencils of the code opponents were inferior in quality, and that by imitating the popular five cent pencil, they were cheating the public. (The question as to the comparative quality of these pencils might well be answered by investigation at the Bureau of Standards.)**

The code provided in detail for terms and discounts of the various types of pencils to various types of customers. These provisions (except that relating to cash discounts and credit terms) were all suspended in the Order approving the code, however, and were never reinstated. It was charged that these provisions were disigned to stabilize prices, but the code authority pointed out that while the various quantity and trade discounts were standardized, the list prices from which they were to be deducted could be varied at will by the manufacturer concerned, as long as any minimum price restrictions which might be established were not violated.***

The list price was defined as the price at which the manufacturer would sell one gross to the consumer. The suspended provisions, in proving a trade discount to dealers, contemplated a price differential which would enable dealers to compete with manufacturers in sales to large consumers. However, discounts on sales from manufacturers to consumers were graduated upwards to a maximum of 33-1/3 per cent (for single shipments of 500 gross or over), while the standard trade discount to dealers was generally 40 per cent, leaving too narrow a margin to permit dealers to profitably compete with the manufacturer in the case of larger purchases by consumers.****

The code proponents stated in their letter of transmittal that the quantity discount had been discarded. However, this statement was inaccurate, as several provisions in Article X established quantity discounts as such, or indirectly had similar effect. Such provisions included Sections 1, 2, 7, 8, 9, 10, 11, 12 and 13, Sections 8 - 12 having been suspended at the time the code was approved. Certain of these provisions, such as Section 11 (which provided for the later establishment by the code authority of graduated cumulative discounts based on the dealer's or distributor's entire annual purchases of industry products) would have offered some price protection to the large wholesaler who served many small dealer accounts, and who otherwise received no such protection under the code with the exception of the low minimum set for direct purchases from manufacturers.

(*) Ibid., pages 448 to 450, 476, 477, 478 to 480. etc.

(**) Ibid., pages 494, 451, 501, 502, etc.

(***) Ibid., 469 to 471, 473, 474 etc.

(****) Ibid., pages, 463 to 471, 480 to 487, 498, etc.

(One wholesaler who served 10,000 small retail dealer accounts, pleaded for the reinstatement of Section 11, in order to receive a price differential over these dealers who otherwise could purchase pencils at the same price he paid for the:)*

The limitation on quantity allowances would have taken away some of the advantage of certain retailers who purchase pencils in large quantities (such as mail order houses, five and ten cent stores, chain stores and department stores) over other wholesalers and retailers. Furthermore, it should be kept in mind that according to the code proponents, one or two of the code opponents were controlled by a large variety chain, which tie-up was effective in beating down industry prices. Thus, any restriction on quantity discounts would tend to impair the effectiveness of this competition, particularly when connected to a minimum price schedule. The code proponents may have had this thought in mind, although they did not entirely discard recognition of the quantity factor.**

Another of these suspended provisions restricted sales of blank pencils for imprinters of advertising pencils to distributors recognized by the code authority, and established the maximum quantity discounts for such sales. (The code authority had a particular desire to limit the distributors of blank pencils, for they tried to have the suspension of this provision removed at the time that they requested the suspension of other provisions.***

The provision establishing standard cash discounts and credit terms was in effect during the life of the code, not being subjected to any particular criticism. It merely fitted into the price stabilization program by preventing the use of excessive cash discounts and credit terms as a means of lowering of the price floor contemplated by the other code provisions. Certain other provisions had the same purpose and interest in connection with the contemplated price stabilization. These provisions prohibited the granting of extra allowances, by prohibiting the giving of advertising allowances or contributions of various named types, or prizes of certain kinds, and limiting freight allowances, the return of merchandise, the furnishing of samples and display equipment, etc. These provisions were effective thruout the life of the code, although the price structure which they were designed to protect was never in operation.****

The provision which limited freight allowances seems worthy of further mention. This provision provided free delivery of any quantity to New York City (the reason for this favoring this particular locality

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(*) Ibid., pages 464 to 468, 483, 484, 487 to 490, etc.

(**) Ibid., pages 427, 428, 429, etc.

(***) Ibid., pages 481 482, 503 to 504, etc.

(****) Ibid., pages 493, 509,

was not given - whether or not the fact that the "Big Four" and most of the code proponents were located in or near New York City, while the code opponents were located in Tennessee has any bearing, cannot be determined from available records), but free delivery in other localities was limited to shipments of 100 pounds or more. The code opponents charged that this was rank discrimination in favor of the larger manufacturers; that it was seldom that the smaller manufacturers with their more limited numbers made up for one shipment a lot weighing 100 pounds. This charge was not answered by the code proponents. However, the provision was in effect during the life of the code.*

The provision concerning samples also might receive further comment. Under this provision the code authority later submitted and had approved, detailed regulations governing the amounts and types of pencils which could be given as samples, and even prescribing the types of materials which could not be used for display folders of cheaper pencils. (The code authority, without stating a reason, later requested the cancellation of these regulations, which request, according to available records, was not granted).**

Another code provision limited the prices of dealer imprints to dealers, to not less than the prices of equivalent types of standard brands, a provision which remained in effect throughout the life of the code. This provision was objected to by the code opponents.***

Restrictions on Size of Shipments or Accounts.

The code provided certain provisions which restricted the manufacturer in his selling program, and which the code opponents charged was designed to cripple them in their attempt to build up a business.****

On such provision prohibited manufacturers from opening new accounts with a dealer for less than specified minimum orders, graduated according to volume class of the manufacturer. This minimum in the case of the code opponents (Class C manufacturers) was $50 net worth for shipment at one time, which minimum, according to the code opponents, would prevent them from obtaining new accounts for dealers would not order that great an amount upon an original trial order. This provision was suspended after several months of code operation.*****

(*) Ibid., pages 506 and 507.

(**) Ibid., pages 493, to 495.

(***) Ibid., page 477.

(****) Ibid., pages 481 to 483, 505 506 to 509, etc.

(*****) Ibid., page 505.

Another such provision provided a considerably lower trade discount to dealers who during the previous year had purchased less than certain minimum quantities (grading according to volume class of manufacturer) from the manufacturers concerned. The code opponent's minimum was set at $100, which they said was prohibitively high and would eliminate many of their accounts, as they were new in the industry and the volume from dealers had to be built up slowly as their products were tried by the dealers, and that no dealers would buy from them at less than the standard 40% discount. This provision was suspended at the time the code was approved. Certain wholesalers demanded even higher minimums.*

Another such provision limited the trade discount to 25% on orders for less than $15 net worth of pencils to direct factory accounts. The code opponents stated that $15 was a large amount for a sample, trial order, and that this provision would prohibit their efforts to grow and to obtain new customers, as well as placing an unwarranted penalty on fill-in orders of higher buyers. This provision, however, was approved and was effective throughout the life of the code.**

Another provision in the code prohibited the sales of special imprints not for advertising, or member's standard brands back stamped, upon orders for less than certain specified quantities. The code opponents stated that this provision was discriminatory in favor of the larger manufacturers.***

In the case of these four provisions the code proponents stated that they were a concession to the wholesalers - an attempt to throw small accounts and orders to wholesalers who were not otherwise recognized by the code; that these small orders and accounts were costly and unprofitable to the manufacturers so that they were glad to get rid of them; and that the minimums had been set as low as they were for the sake of the small manufacturers who needed these smaller accounts, for the large manufacturers would have been glad to set the minimums even higher. However, the code opponents denied that these small orders were unprofitable, and charged that these restrictions were for the sole purpose of stopping their growth. There may be some merit to this charge for the code proponents' answer does not seem a proper defense or justification due to the fact that the minimums were graded according to the volume class of the manufacturers concerned, so that the larger manufacturers could have set their minimums higher had they desired, and the minimums of the smaller manufacturers could have been lowered or eliminated.****

(*) Ibid., pages 481 to 483.

(**) Ibid., pages 508 to 509.

(***) Ibid., page 509.

(****) Ibid., pages, 464, to 466, 508 to 510, etc.

E. Restrictions on Certain Promotional Practices

The code contained certain provisions regulating advertising and other promotional practices of manufacturers. These provisions were claimed by the code opponents and others to be aimed at such smaller manufacturers in an attempt to destroy them.*

One such provision prohibited the furnishing of advertising sheets, in color or otherwise, to dealers for insertion in dealers' catalogs, although pages for insertion in catalogs of customers' salesmen could be furnished in black and white only. The code opponents stated that color advertising was necessary for the sale of colored pencils, and that the Institute sought to bar the only type of color advertising which they could afford; that while this was being done upon a plea of economy, the "Big Four" did not prohibit color advertising in national mediums such as the Saturday Evening Post, or colored lithographed display pieces, and other expensive types of color advertising which only the "Big Four" could afford.**

Another such provision went so far as to limit the use of color in manufacturers' catalogs to the cover and back pages only. (In connection with these provisions concerning use of color in advertising, the Institute's strong desire to limit the use of the yellow color to the standard five cent pencil should be kept in mind.)***

Another provision prohibited manufacturers from displaying their products at any trade conventions or meetings of dealers. (While nothing in particular was said about this provision, it would seem to have little purpose other than to prevent newcomers to the industry from acquainting dealers with their products.)****

Other provisions prevented cooperative advertising between manufacturers and dealers, or the granting of advertising allowances by manufacturers. While these provisions had as one purpose the maintenance of the contemplated price structure (as mentioned previously), it was charged that such complete restriction was unnecessary as legitimate cooperative advertising could be permitted under supervision, but that this was a weapon used against smaller manufacturers who did not have the advertising funds of larger manufacturers.***** It would seem that there was considerable merit in these charges of the code opponents, and that no proper defense was presented by the code proponents. However, these provisions were all approved and remained in effect during the life of the code.

(*) Ibid., pages 452 to 454, 497 to 498.

(**) Ibid., pages 452, to 454.

(***) Ibid., pages 434, and 450 to 454.

(****) Ibid., page 452.

(*****) Ibid., pages 497 to 498.

F. Restrictions Extending Outside of the Industry.

Several of the code provisions directly or indirectly controlled activities of dealers and others not members of the industry.

The four "importers," mentioned at the beginning of this Summary, were forbidden membership under the code and participation in code activities and administration, but the code authority later attempted to gain control over them (as the "importers" earlier charged they would do) by classifying them as "sales agents" and under an approved code provision proposing regulations to considerably restrict their activities. However, the legal adviser ruled that the proposed regulations went beyond the scope of the code in this regard, and they were withdrawn by the code authority.*

One code provision provided that the customary trade discount of 40% off list could not be given to any dealer who handled imported goods which did not conform to industry standards, when such standards were approved. This provision was suspended at the time the code was approved and was never reinstated. The code proponents stated that this provision was necessary in order to make effective the proposed standards. However, dealers handling imported goods objected to this provision as an unwarranted boycott on foreign-made goods, which went beyond the power exercised by Congress over imports.**

Another provision prohibited sales to export houses except upon conditions guaranteeing that the order was for bona fide consumption in the market for which the goods were offered. This provision was in effect throughout the life of the code. (It is interesting to note, however, that the code provided that none of the marketing rules contained in Article X were to apply to the export trade; probably a reason for the above provision. It was charged that this provision was for the purpose of keeping the export trade in the hands of a few.)***

Another set of provisions, which provided for resale price maintenance, provided a boycott upon dealers who failed to contract to maintain such resale prices and to sell only to such other dealers as made similar agreements, through the use of an unfavorable trade discount. However, these provisions were suspended in the Order approving the code. They were severely criticized by certain dealer organizations as an invasion of the rights of non-members of the industry.****

A provision originally proposed by the Institute, but deleted prior to the approval of the code, contemplated considerable control over the

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(*) Ibid., pages 456 to 463.

(**) Ibid., pages 500 to 503.

(***) Ibid., page 503.

(****) Ibid., pages 463, 475, 479, 480 etc.

activities of dealers by prohibiting sales to dealers who used such merchandising methods as "loss leaders", prizes, premiums, etc. *

G. Other Trade Practice Provisions

Most of the other trade practice provisions were of a more or less standard type, prohibiting such practices as improper grade marking and labeling, espionage of competitors, commercial bribery, design piracy, secret rebates, etc. For the most part there was little or nothing in the available records referring specifically to these provisions.**

One provision, however, provided that contracts with buyers must be specific as to quality, quantity and price of pencils to be furnished, and that no contract could extend beyond twelve months. This provision was in effect during the life of the code. Little was recorded concerning this provision, although the code authority complained that it was being violated by one of the code opponents in his contracts with a large variety chain.***

(Incidentally, one of the members of the "Big Four" had had 60% of his volume handled through this same large variety chain, and has losing sales to this chain due to the inroads of this code opponent, who it was claimed, sold his entire volume to this chain.)****

Other provisions, prohibiting combination sales, trade-ins, etc., caused certain criticism but were not of great importance.*****

III. GENERAL COMMENT AND CONCLUSIONS OF INVESTIGATOR.

One point which seemed evident from the records of this code, was the partiality of the long line of Deputy and Assistant Deputy Administrators who handled the code, for the code proponents. While the position of all these administrative officials is not made clear by the records, those for which there is information upon which an opinion can be based, seemed without question to favor the code proponents, either by statements to that effect or by their action or lack of action.****** Many of the charges made by the small manufacturers who opposed the code to the effect that proposals or action of the code proponents was for the purpose or would have the effect, of eliminating them from the industry or restricting their progress, seemed prima facie to be worthy of serious

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(*) Ibid., page 505.

(**) See Chart A, pages 319-325.

(***) See Appendix, Exhibit No. 3, pages 428, 429 and 496.

(****) Ibid., pages 428 and 429.

(*****) Ibid., pages 495 to 496.

(******) For example, see Memos of Deputy, Ibid., pages 425 to 428 438 to 439.

consideration and at least should have prompted careful investigation. Furthermore, these small manufacturers were not alone in registering these protests, for similar charges were made by certain large dealer organizations, and others. In addition, not just a single grievance was voiced, but rather a number of protests all of which pointed in the same direction and seem logical upon their face. However, as far as available records are concerned, most of the statements of the code proponents seemed to have been accepted without investigation and the charges of the code opponents ignored. Most of the provision suspension and other action unfavorable to the code proponents was taken by officials of higher rank than the Deputy in charge and was contrary to the recommendations of the Deputy.*

The same charge might well apply to most of the code advisers. The Consumers' Advisory Board was the sole adviser to object to the proposals of the code proponents at the time the code was presented for approval, having recommended deletion in its entirety of Article X - "Marketing Terms." The Resident Industrial Adviser stated that the larger manufacturers were gaining an advantage over the smaller members of the industry and had things pretty much their own way, yet later recommended unqualified approval of the code. The other advisers recommended approval of the code, although the legal and economic advisers did object to certain later proposals of the code authority which went beyond the scope of the code.**

Based upon the available records, an opinion may be deduced to the effect that the larger manufacturers did set up the elaborate marketing and trade practice schedule for the purpose of bettering their own position at the expense of the new small members of the industry who had been making progress in sales volume at their expense. No evidence is available to prove the charge of the code opponents to the effect that the other small manufacturers lined up with the "Big Four" through fear or promises of protection, but it is certain that little was heard from them in connection with the code. It may also be felt that the code proponents sought also to weaken the position of the "importer" group and of large dealers, such as variety and other chains, who had a dominating influence on the industry. Furthermore, the stated purpose of the code proponents to raise the price average and increase the sale of the higher-priced pencils should be remembered.***

(*) For example, see Appendix, Exhibit No. 3, page 481.

(**) Ibid., pages 443,,454 to 456, 460 to 462.

(***) See pages 280-283, and Appendix, Exhibit No. 3, page 424.

The activities of the small manufacturers who opposed the code cannot be defended on the basis of this record, for there is not sufficient evidence to show whether or not their activities were absolutely bona fide, and did amount to a saving to the consumer through efficiency in distribution. However, their charges concerning their attempted elimination by the "Big Four" under the guise of other purposes for the provisions concerned, did seem to have a background sufficiently logical to call for careful investigation.*

As has been stated before, the fact that many important parts of the marketing program were suspended and never effectively makes it impossible to gauge their actual effect upon the distributive channels through which the products of this industry passed, and limits such information to conjecture based upon the pro and con statements made at the time the provisions were proposed. Furthermore, even in the case of those provisions which were approved, whether or not they were later suspended after several months of operation, the files contain little or no information concerning their operation, or the effects which they produced, if any. (To obtain such information if it is available, it would be necessary to study the files of the code authority at the Institute headquarters in Washington, to interview manufacturers of various types, and certain dealers.)

A final brief summary of the effect of the trade practice and marketing rules proposed by the code proponents which logic and reasoning might lead one to expect, might be as follows:

1. The elimination or serious crippling of certain small manufacturers who had recently entered the industry; this to be accomplished by the following methods, among others:

   a. Allocation of production.
   b. Elimination of price appeal, through stabilized minimum prices.
   c. Through standardization, limiting colors with consumer appeal to higher-priced pencils.
   d. Prohibiting advertising methods within reach of small manufacturers.
   e. Establishing minimums for new accounts, single shipments and annual purchases of dealer which would make it difficult for a new firm to expand.

2. Restriction of the operations of the "importers", who had pencils assembled for them in this country.

3. The virtual elimination of foreign-made pencils, except when handled by exclusive dealers, although chain and department stores might shift to foreign-made pencils exclusively.

4. The establishment of a restricted channel for the distribution of blank pencils to be imprinted for advertising purposes - the recognized "distributors."

(*) See Appendix, Exhibit No. 3, pages 445, 446, 448, 449 and 453.

5. The raising of the five cent price for goods received by manufacturers, and the favoring of the "standard five cent pencil" - which, in spite of statements to the contrary, might well have raised the price to consumers.

6. Retention of direct accounts of large industrial consumers, but shifting of smaller direct accounts to wholesalers and retailers.

7. A loss of distinction between wholesaler and retailer as far as price differential was concerned, although turning small direct dealer accounts over to the wholesaler.

8. Elimination of the advantage of certain large retailers over other retailers and wholesalers, through limitation of quantity distinction - which would also release certain manufacturers from certain domination or threats to their price schedules.

9. Retention of export business upon a basis of free and open competition, not subject to the marketing rules.

10. Protection of the public from being sold goods of inferior quality without compensating price reduction - if such a practice was indulged in.

11. The possible furthering of the competitive advance of other types of writing instruments, through the restrictions on the advertising of industry products and the raising of prices with resultant lowering of the price differential between pencils and other types of writing instruments.

IV. SUGGESTIONS FOR FURTHER STUDY

The material studied in connection with this report of the Wood Cased Lead Pencil Industry and its code activities was limited to data available in the files of the N.R.A. As has been indicated, this data gives practically no information concerning the operation or effect of the various approved trade practice and marketing provisions. Whether or not such material is available outside of N.R.A. is not known, although it seems reasonable to believe that considerable such data could be obtained from other sources. Furthermore, as will be seen from this report, in the case of many of the topics of discussion or controversy, N.R.A. records showed only the arguments of one or both sides, without giving evidence to prove which side was actually correct in its contentions, although frequently the case presented by one side or the other might seem on its face to be most logical.

Therefore, further investigation might be undertaken along the lines indicated below:

1. The records of the code authority should be carefully searched, as they undoubtedly and logically should contain considerable information not received by N.R.A.

a. N.R.A. files do not contain complete minutes of the code authority meetings. In some cases N.R.A. files were limited to brief bulletins issued concerning activities of lengthy meetings. The complete minutes should be obtainable at the Institute office.

b. Certain files on particular matters withdrawn by the code authority were returned to the code authority at its request by the Deputy. Such files concerned such matters as proposed regulation of sales agencies.

c. Undoubtedly such correspondence between the code authority and members of the industry and its distributing channels never was forwarded to N.R.A. Such correspondence might contain valuable information.

d. Certain recommendations of the code authority for action by N.R.A. were not accompanied by reasons or justifying data. Such information might be obtained from code authority files, minutes of code authority meetings, or by oral interviews with persons who participated in such proposals.

2. The Bureau of Standards should be consulted concerning the industry's simplified practice recommendations, and concerning the quality of various types of pencils made by code proponents and opponents.

a. The Bureau files might contain additional information in the form of correspondence or otherwise concerning the equities and inequities of the approved schedule of standards.

b. The Bureau might have, or be able to obtain, information concerning the comparative quality of various pencils, with particular reference to the proponents' much heralded yellow five cent pencil, and the opponents' lower priced pencil which the Institute deemed a cheap imitation. The answer to the question would throw considerable weight to the side it favored.

c. The Bureau might also have data concerning production costs of the various types of pencils, which would be of interest in the same manner as stated in the preceding paragraph.

3. Much data is undoubtedly contained in the files of the Lead Pencil Institute, Inc., the code sponsoring trade association, which material might be of considerable interest if made available.

a. The Institute has been a fact-gathering agency since its founding in 1929, and should have considerable statistical information concerning production and distribution, in addition to that available in N.R.A. files. Such information might fill in some of the "gaps" now prevailing, and should bring general industry data up to date.

b. The Institute would also likely be a fine source for obtaining non-statistical information concerning activities and problems of the industry and its distribution methods and channels.

4. Information could also possibly be obtained from the State Department, Tariff Commission, Federal Trade Commission and other Governmental sources concerning the problem of competition from Japanese and other imported pencils, past and present, and other industry and distribution problems.

5. Personal interviews with manufacturers (including both large and small members of the code proponents and members of the opposition and "importer" groups), wholesalers (possibly through their association) and retail dealers (including independents, chain stores, five and ten cent stores, department stores, and mail order houses, probably through their respective associations), should develop considerable additional information and should present an opportunity for questioning on certain points of particular interest, or concerning which information now available at N.R.A. is very incomplete. A few of the types of data which might thus be obtained are:

a. Present conditions in the industry since the abolition of N.R.A. codes, including trends in sales of higher-priced and low priced pencils, volume position of large and small manufacturers, volume handled through different distribution channels (direct factory to consumer sales, sales by large retail organizations, etc.), relative position of wholesalers and retailers of different types, competition of imported goods (price, quality, volume), unfair methods of competition being practiced, combinations tending toward monopoly or restraint of trade, profit status of industry, production and distribution cost data, etc.

b. Effect of code provisions which were actually in operation upon the various types of firms questioned, and upon the industry generally. (Properly drafted questions should produce information to fill many of the vast "gaps" now present in N.R.A. data concerning this code.)

c. Past conditions and problems of the industry, and information concerning the intended and probable effect of code provisions which were proposed by the Institute, but suspended or disapproved by N.R.A. and concerning the complete marketing plan proposed by the Institute.

d. Recommendations concerning form and scope of future regulation of the industry and the distribution of its products, if any such regulation is considered advisable.

(The information which might thus be obtained should have a bearing upon general industry data (statistical and otherwise), and such particular subjects as price control and stabilization, control of ad-

vertising and other promotional activities, restrictions on methods of distribution (distinguishing types of customers, limiting size of orders, accounts, etc.), standardization of industry products, production control, and other specific types of trade and marketing practices.)

CHART A - Trade Practice and Marketing Provisions in Code of Wood Cased Lead Pencil Industry

PROVISION	SUBJECT	STATUS DURING LIFE OF CODE
Art. II, Sec. 5	Defined "dealer"	Effective
" " Sec. 6	Defined "distributor"	Effective
" " Sec. 7	Defined "consumer"	Effective
" " Sec. 8	Defined "sales agent" and provided that code authority (with approval of Administrator) should adopt regulations for appointment of sales agents	Effective- regulations submitted by code authority, but withdrawn before approval
Art. VII, Sec. 1	Restricted sales to dealers of non-standard imported pencils	Suspended by order approving Code
" " Sec. 2	Prohibited False Grade Marking	Effective
" " Sec. 3	Prohibited Espionage of Competitors	Effective
" " Sec. 4	Prohibited Commercial Bribery	Effective
" " Sec. 5	Restricted sampling to regulations to be submitted by Code Authority for approval	Effective - Regulations submitted and approved - Requested cancellation denied by NRA
" " Sec. 6	Restricted Combination Sales	Effective
" " Sec. 7	Restricted "Trade-Ins"	Effective
" " Sec. 8	Prohibited Price Discrimination	Suspended Nov. 23, 1934
" " Sec. 9	Prohibited Secret Rebates	Effective
" " Sec. 10	Prohibited attempts to substitute lower quality than specified by buyer calling for bids	Effective
" " Sec. 11	Prohibited contracts indefinite as to time, quality, price or quantity or which extend beyond 12 months.	Effective

CHART A - Trade Practic and Marketing Provisions in Code of Wood Cased Lead Pencil Industry

PROVISION	SUBJECT	STATUS DURING LIFE OF CODE
Art. VII, Sec. 12	Prohibited Defamation of Competitors	Effective
" " Sec. 13	Prohibited Piracy of Design, Trade-marks, etc.	Effective
" " Sec. 14	Prohibited False Billing	Effective
" " Sec. 15	Prohibited Piracy of Design of New Pencil Types	Effective
" " Sec. 16	Prohibited Sales to Export House except for guaranteed markets	Effective
" " Sec. 17	Restricted Return of Merchandise	Effective
" " Sec. 18	Prohibited advertising allowances to customers for catalogs, etc.	Effective
" " Sec. 19	Prohibited furnishing of printed Insert Sheets for customers' catalogs for distribution to their trade; permitted insert pages (in black and white only) for catalogs of customers' salesmen	Effective
" " Sec. 20	Prohibited cooperative advertising with customers	Effective
" " Sec. 21	Prohibited allowances for outdoor advertising of customers; permitted gifts of advertising material for window or indoor displays of customers.	Effective
" " Sec. 22	Limited furnishing of sample display equipment and displays	Effective
" " Sec. 23	Limited furnishing of permanent refillable display cases.	Effective
" " Sec. 24	Prohibited giving of prizes to customers' conventions, etc.	Effective
" " Sec. 25	Limited use of color in manufacturers' catalogs to cover and back pages only.	Effective

CHART A - Trade Practice and Marketing Provisions in Code of Wood Cased Lead Pencil Industry

PROVISION	SUBJECT	STATUS DURING LIFE OF CODE
Art. VII, Sec. 26	Prohibited exhibitions by manufacturers at dealers' trade conventions	Effective
Art. VIII	Provided for compliance with standards when adopted by industry with approval of U.S. Bureau of Standards	Effective - Standards later approved
" IX	Classified manufacturers according to percentage of total sales volume (Class A, more than 15% each; Class B, 5% to 15% each; Class C, less than 5% each.)	Effective
" X, Sec. 1	Defined "List Price"	Effective
" ", Sec. 2	Provided free delivery to New York and on shipments of 100 lbs. or over to other points, etc.	Effective
" " Sec. 3	Required open price filling, prices to become effective immediately upon filing	Suspended Nov. 23, 1934
" " Sec. 4	Provided Code Authority (with Administrator's approval) could establish minimum prices to be filed.	Code Authority proposed minimum price schedule, public hearing, June 5, 1934, Schedule disapproved. Provision suspended 11/23/34.
" " Sec. 5	Provided for revised price lists, effective upon filing	Suspended Nov. 23, 1934
" " Sec. 6	Required compliance with manufacturer's filed prices, except obsolete and damaged goods when approved by Code Authority.	Suspended Nov. 23,1934

CHART A

Trade Practice and Marketing Provisions
in Code of Wood Cased Lead Pencil Industry

PROVISION	SUBJECT	STATUS DURING LIFE OF CODE
Art. X, Sec. 7	Provided standard cash discount and credit terms; advance dating privilege on shipments greater than minimums specified (graded according to class of manufacturer)	Effective
" " Sec. 8	Specified maximum quantity discounts to consumer on standard lines and special imprints, not for advertising, quantity for single shipment to govern	Suspended by Order approving Code
" " Sec. 9	Specified minimum terms for selling pencils specially imprinted for advertising purposes.	Suspended by Order approving Code
" " Sec. 10	Specified prices (trade discounts) to dealers for standard lines and special imprints, not for advertising (limited discount to small quantity buyers, graded by class of manufacturers)	Suspended by Order approving Code
" " Sec. 11	Permitted cumulative discounts for annual volume of buyer to be established by code authority with approval of Administrator	Suspended by Order approving Code
" " Sec. 12	(1st paragraph) Limited sales of blank pencils for imprinters of advertising pencils to distributors recognized by code authority; (2nd paragraph) specified discount to distributors on blank pencils for shipment at one time.	Suspended by Order approving Code
" " Sec. 13	Code authority to determine status of buyers under regulations approved by Administrator.	Suspended by Order approving Code.
" " Sec. 14	Provided lower trade discounts to dealers who refused to sign resale price maintenance contracts	Suspended by Order approving
" " Sec. 15	Permitted manufacturers to make and require buyers to sign resale price maintenance contracts.	Suspended by Order approving Code

CHART A

Trade Practice and Marketing Provisions
in Code of Wood Cased Lead Pencil Industry

PROVISION			SUBJECT	STATUS DURING LIFE OF CODE
Art. X,		Sec. 16	Restricted opening of new accounts with dealers buying less than specified minimums (graded according to class of manufacturer.)	Suspended November 23, 1934
"	"	Sec. 17	Prohibited evasion of minimum prices through bids using fractions of a cent.	Suspended November 23, 1934
"	"	Sec. 18	Provided lower trade discounts on direct factory shipments of less than $15.00 net worth of pencils.	Effective
"	"	Sec. 19	Prohibited sales of non-standard lines at less than prices of equivalent standard lines.	Effective
"	"	Sec. 20	Limited blank pencils and special and advertising imprints to types in standardization schedule, when approved.	Effective
"	"	Sec. 21	Limited minimum prices to dealers for dealer imprints to minimum prices for equivalent types of standard brand pencils.	Effective
"	"	Sec. 22	Specified minimums for shipment and billing of special imprints not for advertising and standard brands, back stamped.	Effective
"	"	Sec. 23	Provided that Art. X should not apply to export trade (including Philippine Islands.)	Effective

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Provisions Contained in Code Proposed at

Public Hearing but Deleted Prior to Code Approval

Art. V			Limited domestic sales to the restrictions as to prices and terms imposed by Schedule B	Deleted

CHART A

Trade Practice and Marketing Provisions
in Code of Wood Cased Lead Pencil Industry

Provisions Contained in Code Proposed at
Public Hearing but Deleted Prior to Code Approval

PROVISION	SUBJECT	STATUS DURING LIFE OF CODE
Art. VII, Sec. 5	Code Authority to endeavor to develop a uniform cost accounting system, for submission for Administrator's approval.	Deleted
" " Sec. 6	Upon approval of uniform cost accounting system, sales below individual cost of production, as determined thereby, prohibited after 90 days.	Deleted
" " Sec. 7	Required filing of revised price list after 90 day period to conform to cost requirements.	Deleted
" " Sec. 8	Exempted export trade from Sections 6 & 7	Deleted
Art. VIII, Sec. 9	Prohibited sales to dealers who resold below fixed minima or agreed resale prices.	Deleted
" " Sec.18	Prohibited sales to dealers who were code violators, or who sold by use of "loss leaders", prizes, premiums or commercial bribery.	Deleted
" " Sec.19	Prohibited sales to bankrupts, etc. except for cash, until paid entire indebtedness to industry members for pencils purchased.	Deleted
Art. IX, Sec. 2	Prior to approval of industry standards, schedule adopted at industry meeting held Aug. 5, 1933, should apply.	Deleted
" " Sec. 3	This Article was not to apply to export trade.	Deleted
Art. X,	Allocation of Production	Deleted
Schedule B, Sec. 6	Provided action to be taken when member found not selling in accordance with code requirements as to list prices.	Deleted
Schedule B, Sec. 8	Operation of provisions relating to price lists subject at all times to Administrator's approval.	Deleted

CHAPTER III*

THE CORK INDUSTRY

I GENERAL INDUSTRY DATA

A. History and Size

The fabrication of cork products constitutes one of the world's oldest industries. The uses of the material were known to ancient Egypt, and cork itself, the light outer bark of a species of oak tree, has had a commercial value for centuries. The raw material is indigenous to the countries bordering on the Mediterranean Sea, with the bulk of the supply coming from the Iberian Peninsula and Northern Africa. The chief use of cork has until comparatively recently been almost exclusively for stopper purposes and for marine equipment. In the former use its merit lies in its capacity for expansion; in the latter, its characteristic buoyancy.(**)

It was not until midway in the nineteenth century that a cork industry was established in the United States. The original factories were located in the northeastern States and were engaged only in the production of cork stoppers and marine goods. Some forty years elapsed before the manufacture of cork insulation was started, and it was still later that cork composition and cork tile became important products. It is thus apparent that while the industry itself is of ancient origin, the American branch as now constituted has only a brief history.

One of the chief obstacles to the growth of the industry in this country has been a complete dependence for raw material upon the Mediterranean area, coupled with the fact that in the production of stoppers and marine goods American producers have always had to compete with cork products from the same area. Although complete information as to the efforts to meet this situation is not available, it is known that American manufacturers have defended their position through the tariff, through buying control of sources of raw material, and in some cases by establishing branch factories close to supplies of native cork(below - Armstrong Cork Company). However, in the fields of cork insulation, composition and tile, competition has mainly existed between these products and domestic manufacture of substitutes or of articles for which cork itself was originally used as a substitute, e.g., clay floor tile.

(*) This Chapter was written by James Wallace McTally

(**) U.S. Tariff Commission. Trade Information Series - Cork. Washington, 1921

Here utility and price are controlling factors.(*)

The industry is small in number of establishments, number of employees and dollar volume of business. The Census of Manufactures for 1933 reports the existence of 36 firms primarily concerned with the manufacture of cork products, a decrease of five from the 1931 figure. Total value of products was $11,235,516, as compared to $14,877,454 in 1931 and $23, 143,329 in 1929. Manufactures in New York and New Jersey combined usually account foralmost fifty percent of the total volume.

A few companies produce a large part of this volume of sales. In 1929 ten of the thirty-five establishments produced 88.8% of the volume while the remaining twenty-five establishments accounted for only 11.2% of production. In 1931 six of the thirty-one firms then in existence produced 78.6% of total volume.(**) The President of the Cork Institute in 1933 remarked that "as regards the size of its units the industry is strikingly one of extremes, being made up of six or seven large companies, well financed and in several cases, completely integrated, and at the other end some twenty-odd small companies employing relatively few workers and making usually only one product."(***)

Total employees of the industry numbered 4,265 in 1929, 3,018 in 1931 and 2,334 in 1933, a decline of more than one-third in four years. Some insight into the location of these employees and the amount of business and labor policies of their employers can be gained from statistics of weekly hours for workers in the industry. Of 35 establishments in the industry in 1929, 31 had a work-week of not more than 54 hours and 14 of these worked less than 40 hours per week. Whereas these 31 industry members employed 2,219 workers, the remaining 4 firms in the industry, which worked in excess of 54 hours weekly, had a total of 1,633 employees. The situation was even more marked in 1931, when with only 31 establishments in the industry, five, working employees more than 54 hours weekly, employed a total of 1,646 workers and the other 1,372 employees in the industry were distributed among 26 concerns observing a work-week of less than 54 hours.(****)

(*) Material bearing on the Cork Manufacturing Industry, Research and Planning Division report, October 27, 1933, p. 4, Research and Planning Files.

(**) Ibid. P.3

(***) Transcript of Code Hearing, October 25, 1933, p. 33, NRA Files.

(****) Material bearing on the Cork Manufacturing Industry, Statistical Appendices; also Labor Advisory Board report, undated.

The industry divides easily by nature of product although several firms manufacture more than one line. The Armstrong Cork Company is the only establishment in the industry which makes every type of cork product. Listing the number of firms producing the different lines, with figures based on a period in 1935 when there were 30 industry members, the result is as follows:(*)

Stoppers	18
Marine goods	4
Insulation	6
Composition	5
Floor tile	4
Bulletin and Display Board	10

Until August 14, 1933, when the Cork Institute of America was created for Code purposes, the only association of employers in the industry had been that of the insulation manufacturing group. This was the Cork Insulation Manufacturers' Association, formed in 1933.

The Armstrong Cork Company is easily the preponderant influence in the industry. Deputy Administrator Walter G. Hooke in a report of August, 1934, stated that this company "is by far the largest in the industry and normally does about 75% of the business of the country."(**) An official of the company is quoted as having said that Armstrong is satisfied with the 60% of total sales it usually secures because a greater proportion might lay it open to charges of monopoly.(***) The most frequent estimate of this company's share of sales of American cork products is 60%.

1. Armstrong Cork Company

The Armstrong Cork Company was incorporated in Pennsylvania in 1895 as the successor to Armstrong Brothers and Co., Inc., which had been established in 1891. At present it operates in addition to two plants at its headquarters in Lancaster, Pennsylvania, factories located in the following cities: Camden, Gloucester, and New Brunswick, New Jersey; Pittsburgh and Beaver Falls, Pennsylvania; Fulton, N.Y.; Greenville, South Carolina; and Pensacola, Florida. Four large and two small factories are maintained in Spain, and over thirty cork baling and shipping stations are operated in foreign countries.

(*) Report from Code Authority, NRA files.

(**) Walter G. Hooke, Deputy Administrator, memo to Major George Berry, August 20, 1934. NRA files.

(***) Reed H. Pond summary of Cork Industry for Consumers' Advisory Board Files, June 15, 1935, NRA files.

There are two French, one Canadian, one Spanish, one Portuguese, and one English corporation among the foreign subsidiaries, while the American subsidiaries of the parent company consist of the Armstrong Cork Products Company, the Cork Import Corporation, the Armstrong Development Company, and the Armstrong Cork Company of California. The Pennsylvania Trading Company, a subsidiary handling importations of raw cork, was liquidated in 1934. The Armstrong Cork and Insulation Company, another subsidiary, became on January 1, 1935 the Armstrong Cork Products Company, serving as the sales outlet for all products of its principal.(*)

The net sales of the company for 1934 were $22,593,108. This figure represents the aggregate of many various products whose imposing diversity indicates the complete integration of Armstrong. The insulation division produces not only corkboard and cork insulation, but also "temlock", a substitute, and other privately branded alternatives. The closure division manufactures caps, crowns, metal covers and rubber stoppers in addition to a standard line of corks. Cork shoe products, cork textile mill accessories, cork gaskets and other automobile accessories, bulletin board, and marine goods, all turned out in different shapes and styles for particular usages, are supplemented by a wide range of miscellaneous items. The waste from all these operations finds ready usage in the manufacture of another leading item, linoleum.(**) Sales Offices are located in the following cities:(***)

Albany	Dallas	New Orleans
Atlanta	Denver	New York
Baltimore	Detroit	Philadelphia
Birmingham	Houston	Pittsburgh
Boston	Jacksonville	Rochester
Buffalo	Kansas City	St. Louis
Charlotte	Lancaster	San Francisco
Chicago	Los Angeles	Seattle
Cincinnati	Memphis	
Cleveland	Minneapolis	
Montreal	Paris	
Toronto	London	
Winnipeg		

(*) Moody's Investments, 1935

(**) Armstrong Cork Company. Cork. 1930 edition. Lancaster, Pa.

(***) Ibid.

The net income of the Company, excluding foreign subsidiaries, is listed as follows for the seven years ending with 1934. (*)

1928		$3,945,633
1929		4,814,646
1930	Loss	3,384,414
1931	"	2,235,120
1932	"	1,607,645
1933		2,450,600
1934		1,812,345

The relation of domestic sales and domestic manufacturing expenses (excluding salaries and commissions) over the same period was:(**)

1929 = 100

	1927	1928	1929	1930	1931
Sales	77.4	88.8	100	70.0	49.3
Expenses	-	-	100	94.0	79.5

	1932	1933	1934
Sales	33.5	37.8	48.7
Expenses	51.6	49.8	74.5

The Census of Manufactures indicates the location of the industry's sales only generally; complete information on the relative importance of various products in the total volume is not available. Cork stoppers had a dollar volume of $3,539,075 in 1933 against $3,382,183 in 1931, while cork insulation and tile together did $5,267,605 in 1933 and $6,028,905 in 1931. Since floor tile is known to be a minor item compared with stoppers and insulation it can be seen that these latter products comprise the field of greatest dollar volume. The combined sale of the other three industry products (composition, bulletin board, and marine goods) usually approximates the cork stopper total. From the statistics available it would appear that insulation is the main product, with stoppers an important second and the other products of lesser volume.

(*) Poor's Industrials, 1935

(**) Moody's Investments, 1935

B. Cork Insulation

In the Spring of 1934 (the period at which the only available information was compiled) there were five establishments primarily concerned with the production of cork insulation and a few others doing some incidental business in that line. The following are the approximate percentages of that business handled by the various members of the Industry:(*)

Armstrong Cork Company	55%
Cork Insulation Co., Inc.	10%
United Cork Companies	17%
L. Mundet and Son	13%
Mitchell and Smith, Inc.	3%
All others	2%

Of these concerns Armstrong, as mentioned above, is the only one making a full line of cork products. The Cork Insulation Co., Inc., is the only concern engaged exclusively in the production of insulation; the others produce other lines in amounts ranging from 10 to 40 per cent of their totals. Of these insulation manufacturers Armstrong and Cork Insulation Company are strongest financially, the former being the giant in the American cork industry. The latter, controlled by British backers, Lord Vestry and Sir Edward Vestry, possesses the newest plant in the industry and is at least on a par in efficiency with the Armstrong Cork Company.

"The position of the other companies is doubtful and it seems likely that they are somewhat dependent upon Armstrong for whatever well-being they may obtain!"(**)

At the tariff hearing of 1929, when the larger companies sought an increased rate on cork board (cork insulation) (***), the following statement was included in the opposing brief submitted by the cork importers, among whom only the Insulation Cork Co. (sic) is of appreciable size:

"The brief which has been filed by the domestic manufacturers of cork products is misleading in many of its features. The brief is signed by six firms, but only three of these, namely, the Armstrong Cork Co., the United Cork Co., and L. Mundet & Son (Inc.), manufacture cork board. These three firms operate cork-board factories both in the United States and foreign countries. One of them manufactures approximately 70 per cent of all cork board sold in the United States. Of this 70 per cent, it is estimated that one-half is manufactured in the United States and the other half in a foreign country. It is also represented by the six

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(*) Martin Taitel, Research and Planning Division, memo to J.A. Hillman, Division III, on Cork Insulation Merchandising Plan of May 7, 1934. May 25, 1934. p.1., NRA files.

(**) Ibid., p.2.

(***) See below - Tariff

> domestic manufacturers of cork products that their firms have an investment of $30,000,000 and employ 7,400 men, but no mention is made of the fact that the total investment in manufacturing cork board in the United States does not exceed $4,000,000 and the number of men employed in the manufacture of cork board in this country does not exceed 500." (*)

It is indicated in testimony at public hearings and by a report of the Research and Planning Division that the Armstrong Cork Company has been in the habit of publishing its prices, and other industry members of following these lists. Another statement from the tariff hearing brief indicates that there is no wide range of prices between competitors except in unusual circumstances. (**)

(*) Tariff Readjustment - 1929, Hearings before the Committee on Ways and Means, House of Representatives, 70th Congress, Second Session, Vol. XIV, Schedule 14, Sundries, p. 7289. Washington, 1929.

(**) Ibid. p. 7290

" Although it has been represented that an increased duty is necessary to prevent the foreign competitors from driving them out of business, it is noted that this representation is based upon heavy losses alleged to have occurred from July, 1927, to December, 1928. An investigation will show that during this period prices were depressed by a price war among the domestic manufacturers themselves, and the domestic manufacturers make no mention in their brief of the market price of 10½ cents in 1926 nor of the prevailing market price of 8½ cents, nor of the fact that the depression in prices from July, 1927, to December, 1928, affected the importers as well as the domestic manufacturers of cork products."

With quality standardized the bulk of sales has naturally gone to Armstrong by reason of its prestige, the other companies having maintained their fields through factors of geography, service, and association with established customers.

Distribution of cork insulation products is effected by Armstrong principally through factory branches; there is varying evidence in regard to the company's claim that it sells as much as 30% through distributors. Cork Insulation Company uses distributors and agents almost exclusively, and others either combine the methods or use agents and distributors, the preponderance being with the latter. In most cases these agents and distributors are under contract with one manufacturer. Some manufacturers sell direct to ultimate consumers and some to other manufacturers who use cork in their products. Where factory branches, consisting of sales offices and warehouses, are established in numbers and over a wide area as the backbone of a distributing system, such agencies are in a position to provide services which independent distributors must strive to equal. Distributors who as a sideline supply crews to erect the cork insulation sold have been greatly affected by the practice of manufacturers supplying such crews from their factory branches. This practice seems to have begun with Armstrong; it is known that two others have followed suit. Dealers complain bitterly that manufacturers supply this service from their factory branches at cost since they are satisfied with the profit on the product alone, whereas the distributors had formerly taken an additional fee over the labor expense. (*)

The following outline indicates the distribution set-up and establishes terminology to be used below: (**)

(*) Walker-Jamar Co., Duluth, Minn., letter to Consumers' Advisory Board, April 3, 1934, NRA files.

(**) Martin Taitel, Research and Planning Division, memo to J. A. Hillman on Cork Insulation Merchandising Plan of May 7, 1934, May 29, 1934, p. 3, NRA Files.

Manufacturer	Agent, Distributor, or Factory Branch	Resale buyers (those who use cork insulation for construction or in connection with installation of their products). Consumers (those who use cork insulation in connection with their own manufacturing operations and all others not included as resale buyers).

There is reason to believe that customer classification along these lines has been customary in the industry; Deputy Administrator Walter G. Hooke, describes a similar set-up as "based on long established trade practice and custom in the industry". (*) However, no definite information is available on its length of existence or rigidity. Available evidence indicates that prices to resale buyers are lower than those to consumers, and that exclusive distributors receive better treatment than independent agents or non-exclusive distributors, but here again nothing definite can be established. It will be seen below that the attempt of the manufacturers in this group to write such a system into the Code met with determined resistance from one of their own number (Cork Insulation Co.) and from the largest non-manufacturing distributor of cork insulation products (York Ice Machinery Co.).

In a report to General Hugh S. Johnson, dated September 15, 1934, Deputy Administrator Hooke stated: (**)

> " All five manufacturers are economically efficient and all meet each other competitively on a substantially equal basis ... Cork Insulation products are sold in the trade by all five manufacturers both directly through branches and indirectly through distributors. Each manufacturer apparently has a preference for one or the other of these selling methods, but all five use both methods in varying degrees. According to the testimony at the Public Hearing, one of the larger manufacturers which has the largest number of direct branches, nevertheless sells approximately 30% of its products through distributors who are in direct competition with other manufacturers, their branches and **distributors.**"

The Research and Planning Division reported generally on the cork industry on October 27, 1933, and on May 29, 1934, gave a short account of the cork insulation group as a preliminary to its comments on a proposed merchandising plan. Other than this no research was made into the situation of this industry. In all of the subsequent difficulties arising out of the merchandising plans proposed by the industry

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(*) Walter G. Hooke. Report to General Hugh S. Johnson on Cork Insulation Merchandising Plan, September 15, 1934, NRA files.

(**) Hooke to Johnson, memo, Sept. 15, 1934, NRA files.

(which will be fully discussed below), while partisan groups set forth opposing contentions and administrative agencies debated policy, there seems never to have been assembled a comprehensive picture of the workings of the industry previous to the Code. The Deputy's statement given above indicates that there was no agreement even on the scanty information presented here in regard to the cork insulation group.

C. Cork Stopper

The stopper manufacturers are numerically the largest product group in the industry and being the original cork industry in the United States number among them several small, but well established, old companies. Despite the fact that there are 18 manufacturers in this group it is claimed that Armstrong Cork Company alone controls 60% of the sales of this product and with two other manufacturers, one of which is L. Mundet and Son, controls 80%. (*) No actual statistics adequate to an understanding of the relative positions of firms in this group have been located.

To the stopper manufacturers the great problem centers about the importation of finished corks from abroad. Independent importers compete directly with American manufacturers and their distributors, although the extent and effect of this competition in unknown. The industry presented this situation to the Administration along with the original proposed code and requested that the Code be so drawn as to afford them protection against import.

Despite the fact that the industry seemed fairly unanimous in its appeal for control of imports, it later devolved that two major companies had already found means of coping with the situation. Coyne and Paddock, a smaller concern, charged in a letter of May 12, 1934, that Armstrong Cork Company and L. Mundet and Son were operating their own factories in Spain and were as much responsible for the foreign competition as the importers themselves. About the same time distributors of cork products made protests against the policy of the same two companies of cutting under their prices for domestic corks on small-quantity sales of imported corks, and that the results were disastrous to distributors of domestic corks.

Distribution of cork stoppers follows generally the method used in the insulation branch of the industry, although even less factual information is available. Manufacturers in some cases sell direct to large manufacturers as in the case of proprietary medicines. Most sales go through factory branches and manufacturers' distributors, the latter consisting of distributors who handle exclusively the products of one manufacturer and jobbers who handle the products of several manufactueres. Another class is composed of wholesalers who in the process of a general distribution service deal in corks along with other commodities. (**) The manufacturers' distributors receive preferential treatment over wholesalers, and within their own group the exclusive dealers get better terms than jobbers. As in the case of the cork insulation group nothing is known of price differentials, terms of sale, or handling of greight charges.

Not even such a sketchy report on the industry as was made by the Research and Planning Division for the insulation group is available for

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(*) Coyne & Paddock, Inc., Long Island City, N.Y., letter to Senator Robert Wagner, May 12, 1934, NRA files.

(**) Criticisms of Research and Planning Division and Consumers' Advisory Board on Cork Stopper Merchandising Plan. August 6; July 12, 1934 Deputy's files.

division for the [illegible] for the cork stopper division. Smaller industry members and distributors who protested from time to time gave partial information substantiating the facts outlined above, but neither the Cork Institute nor the Administration seemingly ever prepared a statement on the set-up and customs of the industry. Such data seems to have been thoroughly neglected in favor of opinions concerning the probably effect of certain Code provisions under consideration.

D. Cork Composition; Floor Tile; Marine Goods; and Bulletin and Display Board.

No information whatever on the pre-code situation in the cork composition, floor tile, marine goods, or bulletin and display board branches of the American cork industry has been located. When the proposals of these divisions in regard to merchandising plans designed to supplement the Code are discussed below some light may be thrown on existing conditions, but such information is disputable and inconclusive.

From the fact that the Armstrong Cork Company is conceded 60% of the total sales of cork products in the United States, with about 55% of insulation and about 60% of cork stoppers, it may be inferred that the same company averages about the same percentage of total sales in these four minor divisions. It produces in each of these four fields and is therefore one of four companies manufacturing marine goods, one of four tile producers, one of five composition manufacturers, and one of the ten bulletin and display board firms. It is a fair assumption that the Armstrong Cork Company approaches a dominating position in each of these fields with the possible exception of bulletin and display board, where it is known that in addition to the ten cork companies engaged in production several manufacturers of other commodities produce this article as a side-line. If this assumption be justified then it is also likely that the general Armstrong policy of preferring to use its factory branches for distribution has had an effect upon jobbers and wholesalers in these lines.

E. Tariff

Protection has been afforded the cork industry over a considerable period, but the recent trend deserves particular comment. While the raw material, corkwood, has remained on the free list, there has been a significant increase in duties on manufactured products over the past two decades. Cork insulation in particular has received greater protection, the change coming concurrently with its increasing importance and value in industrial usuages. From 1913 to 1930 when the most recent legislation was enacted, large cork stoppers (over $\frac{3}{4}$ inch in diameter) the rate per pound rose from 12 cents to 20 and finally to 25; while duty on smaller corks went from 15 to 25 and to 31 cents per pound. However, the 1930 rates of 25 and 31 cents fell considerably short of the industry's request

of 40 and 50 cents duties respectively. (*)

Over the same period, in the tariffs of 1913, 1922, and 1930, cork insulation rates changed from ¼ cent per pound (the equivalent of 1/5 cent per board foot) to 30% ad valorem (equal to 1.3 cents per board foot), and finally to 2½ cents per board foot. The 1930 rate was just ¼ cent short of the industry's request for a 2 3/4 cent rate, and represents an increase of 1150% over the 1913 rate. In the argument for such an increase the American manufacturers(**) used several impressive arguments, some of which, however, seemed mutually exclusive. Thus the industry described the high wage system in America and the differential between these wages and the foreign scale, and argued that lack of adequate protection had forced American manufacturers to locate factories abroad. Both the differential in wages and the industry's escape from the differential therefore stood separately as arguments for higher duties. Again, the industry showed statistics of an increase in importations of foreign insulation; only mentioning in another connection, as a separate argument, the fact that American firms were swelling this total with the products of their own factories abroad. The petitioners also state that manufacturing plants in Spain and Portugal have been increasing in number and productive capacity without adding the important corollary that foreign-owned plants in those countries have been declining in both regards.

The importers who opposed the higher duties of the 1930 tariff (***) were of course also arguing from the standpoint of their interest. Their request for an investigation of the situation by the Tariff Commission was without result.

> "In brief, the total amount of cork board manufactured in foreign-owned factories and sold in the United States during 1928 was 25,000,000 board feet or 18 per cent of the total amount of 135,000,000 board feet used during that year in the United States. .... We cannot estimate the added cost if the increased tariff should result, as is apparently desired by the three domestic manufacturers, in the closing down of the foreign-owned cork-board factories, leaving the selling prices in the United States entirely to the will of

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(*) Tariff Readjustment - 1929. Hearings before the Committee on Ways and Means, House of Representatives. 70th Congress, Second Session. Vol. XIV Schedule 14 Sundries. p. 7279 et seq. The brief presenting the American industry's demands was opposed by one offered by the importers of cork insulation, but no contrary evidence was presented in regard to other cork products.

(**) United, Mundet, Armstrong, Paddock, Truslow & Fulle, and Crown Cork & Seal.

(***) Luse-Stevenson Co., Insulation Cork Co., and Wicander and Co., Inc.

American manufacturers operating their cork-board factories at home, or both at home and abroad, as they might deem expedient.

> "The duty on cork board should not be increased without thorough investigation of the profits realized by American manufacturers over a period of years."

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The above attempt at a picture of the pre-code background of the American cork industry is incomplete in many respects. There is no reliable information on the proportion of total sales held by the individual industry members, on the relative importance of these companies in the different branches of the industry, or on the impact of cork substitutes and imports on the industry. Financial conditions and interrelations are unknown; there is no gauge of the dominance of certain industry members. One cannot discover trends in distribution methods with anything approaching preciseness; the extent to which certain methods are used is extremely vague, as are the reasons for preference. The condition of wholesalers, distributors, jobbers, and agents, a vital point throughout the Code period, remains undescribed. Discounts, terms of sale, price differentials, and treatment of freight charges are unknown quantities. The bits of information given above are dwarfed by the great lack of essential data.

CHAPTER 11

II. THE CODE PERIOD

A. Code History

1. The Approval of the Code.

The Cork Institute of America, established on August 14, 1933, applied for a Code on September 7 of the same year. The sponsor declared itself an association of 24 of the 26 cork manufacturing establishments in the United States, with membership representing 98% of the total dollar volume for the previous year.

After two preliminary conferences between the Code Committe of the Cork Institute and representatives of NRA, a public hearing was held on October 25, 1933, with Deputy Administrator R.B. Paddock presiding. Here the industry's proposed code, which had undergone certain revisions in the preliminary conferences, was further amended, and sent to the Advisory Boards for comment and criticism. Following additional revision which was prompted by the advisors, the final code went out again to the Advisory Boards for their approval. The Legal Division, the Research and Planning Division, and the Industrial Advisory Board approved this last version; Consumers' Advisory Board and the Labor Advisory Board made approval conditional upon further specified changes. Deputy Paddock forwarded the Code th General Johnson without further amendment, accompanying it with a reply to the objections of the Consumer and Labor Advisers. Division Administrator Berry recommended approval, and the Code was approved on January 12, 1934, to become effective ten days later.

The nature of the trade practice provisions and their varying fortunes will be discussed below under certain groupings as to type. Wages were set at thirty-eight cents per hour for males and thirty cents per hour for females, both being minimum rates. Hours were forty per week averaged over a three-month period, with a limitation to forty-eight hours in any one week. The Labor Advisory Board based its final objection on the limitation of time and one-half overtime pay to those cases where the employee's <u>average</u> was in excess of forty hours per week, and to the exemption of $25.00 per week assistants from the maximum hour limitation.(*)

2. Definition and Division of Industry.

The code carried a provision for the division of the industry into six product groups, and accordingly there were established the following Divisions:

Cork Stopper Division
Cork Insulation Division
Cork Composition Division
Marine Goods Division
Floor Tile Division
Bulletin and Display Board Division

(*) Leo Wolman, Labor Advisory Board. Report on Cork Code, December 27, 1933. Labor Advisory Board Files.

The industry's claim that these divisions had widely differing trade practice problems was recognized, and Code provisions were left rather general in character. However, provision was specifically made for each Division to submit a merchandising plan designed for its exclusive use, which plan after approval should become part of the Code for that product group.

The Industry definition reads: (*)

"The term 'industry' as used herein includes the manufacture and sale, including jobbing and wholesaling, of the products of the industry, and branches or subdivisions thereof as may from time to time be included under the provisions of this Code."

The inclusion of jobbing and wholesaling under the jurisdiction of a manufacturing group met with considerable opposition from the Advisory Boards. The industry itself professed a realization of the injustice of the attempt to bind distributors who had no representation or participation in the formulation and administration of Code provisions. When Amendment No.1 to the Code, deleting the words "including jobbing and wholesaling" from the definition, came up for public hearing on June 22, 1934, the Code Authority requested the change. A. L. Faubel, Secretary, explained that in pre-code conferences with Deputy Paddock an appeal for relief from the competition of imported goods was made, and that Paddock had stated that the only means available to NRA consisted of including the importers under the Code. (**) It may perhaps be significant that just previous to the proposal of this amendment, complaints began to come in from distributors who charged that Armstrong Cork Company and L Mundet & Son were demoralizing the domestic cork stopper market with cut-price importations from their factories in Spain. (***) If there is a connection between these incidents it indicates that the larger companies had anticipated the eventuality and prepared for it.

3. Merchandising Plans

Immediately after the promulgation of the Code the Code authority busied itself with the Executive Committees of the various Divisions for the formation and proposal of merchandising plans. It should be mentioned that the Code Authority consisted of the thirteen members of the Board of Directors of the Cork Institute. Armstrong, Mundet, and Mitchell & Smith, Inc. were each represented by two Directors; seven other firms had one Director each. The Board was representative of the various Divisions, but the election rule here quoted gave a marked power to the companies with greatest volume: (****)

(*) Art. II, Sec. 2, Code for the Cork Industry. Codes of Fair Competition, Vol. V, p. 48.

(**) Public Hearing on Amendment No. 1 to Cork Code, June 22, 1934. Transcript, pp. 3-5

(***) Constitution and By-Laws, Cork Institute of America NRA Files.

(****) Constitution and By-Laws, Cork Institute of America NRA Files.

"Directors (other than the Chairman of each Division who shall be a member of the Board ex officio), in order to be elected to represent the Division, must receive at least a majority of the votes of the members thereof together with the concurrence of members of the Divisions representing at least three-fourths of the dollar sales volume of the products of the Division as shown by the records of the Cork Institute for the preceding six months period."
(Italics mine)

When later it was found that each of the proposed merchandising plans carried a provision requiring the votes of representatives of at least 75% of the dollar volume for amendment, it was freely charged that Armstrong dominated the two other companies who, combined with it, constituted the required percentage.

Since the merchandising plan provisions are to be discussed below in groupings according to the nature of the trade practice provisions, the following account of the time sequence of these provisions will serve to establish the chronology of events subsequent to Code approval.

The Merchandising Plan for the Cork Stopper Division was the first of five such plans to be submitted by the industry. Originally proposed in February, 1934, it was revised and resubmitted on Abril 6, together with proposals for Insulation and Bulletin Board plans. Two weeks later a conference of the Code Authority, Deputy, and Advisory Board representatives was held with reference to these plans, and in accordance with decisions there reached the Insulation and Bulletin Board plans were revised and resubmitted on May 14. On June 2 the Code Authority proposed a plan for the Floor Tile Division, and three days later one for the Marine Goods Division. Thus within five months after the Code the industry had submitted all its proposals for divisional merchandising plans.

A public hearing was held on the Insulation and Bulletin Board plans on June 22, with a post-hearing conference next day. The changes made necessary by that hearing were made in the plans, as will be seen below, and they were sent in once more by the Code Authority on July 18. In the meantime the Cork Stopper Plan, further altered, had been resubmitted. Later in August the Code Authority suspended action on all except Cork Insulation and requested the Administration to consider this one solely and as a model for subsequent procedures. On August 31 Deputy Hooke, having conferred with his aides and Advisors, announced to the Code Authority that the Insulation Plan remained unsatisfactory after two alterations and required further amendment to meet the following ten objections, an accumulation of those most persistently raised in one quarter or another:(*)

"1. Plan must receive approval of at least 75% of the dollar volume of the division's sales for the preceding six months.

(*) Code History, p. 90.

"2. Any Plan submitted should be a form to be followed by members of the Industry in submitting their own Plan and should not be a merchandising Plan for the Industry.

"3. Objection to classification of customers.

"4. Ten day waiting period is contrary to policy.

"5. Objection to zoning systems.

"6. Proposed Plan did not comply with Office Memorandum No. 228.

"7. Objections to provisions prohibiting the granting of higher quantity discounts unless orders were delivered to one destination.

"8. Objection to resale price maintenance.

"9. Objection to provision regarding consignment selling.

"10. Objection to mandatory classification of customers."

This list is cited here only as an example of the nature of objections which delayed approval of the merchandising plans submitted. Very few, if any, of these objections originated in the Deputy's office; almost all were brought forth by Consumers' Advisory Board, Research and Planing Dividion, and the Legal Division.

The Code Authority reported on September 7 that it had approved a new Plan, and this Plan went, at the request of Consumers' Advisory Board, to the Advisory Council of NRA. There a public hearing was held before a Sub-committee on October 4, and again the industry was required to make further alterations in its plan. When a new plan was proposed later in the month, it was found that the latest alterations had been so drastic that the Plan could only be fitted in under the empowering Code provision through an amendment. (*) Accordingly, a public hearing was held on November 13 to consider the new plan and Code amendments which would authorize its approval.

The public hearing necessitated revision of both the tentative Insulation Plan and the proposed Code amendments. Through the action of the consumers' Advisory Board these were returned to the Advisory Council, which on December 13 suggested methods of reconciling the aims of the industry with NRA policy. The Council considered in this instance only the Form of Agreement, a model manufacturer-distributor contract, and the Code amendments proposed. The amendments were revised and were accepted by the industry provided the Cork Insulation Plan were approved simultaneously. Five days later, on January 15, Assistant

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(*) Because it called for price-filing by distributors, and distributors had been removed from the industry definition by Amendment No.1

Deputy Bryron E. Ball, at this time acting as Deputy while Walter C. Hooke was acting Division Administrator, forwarded the amendments and the Insulation Plan to NIRB for final approval. The adverse comments of two Advisory Boards did not accompany the proposals "In view of the fact that this Merchandising Plan has been before the Administration for such a long period of time and because they want immediate action by the Board in regard to this matter." (*) Deputy Hooke as Acting Division Administrator gave his approval, and on January 16, 1935, Code Amendment No. 2 was approved, as was the Cork Insulation Plan.

On February 1, 1935, the Marine Goods Plan, further revised, was submitted by the Code Authority. This not being as far-reaching as its predecessor and considered a model plan by Consumers' Advisory Board, approval was granted on March 30 without dissent. The Cork Stopper Plan was then put forward once more, but inasmuch as it was more nearly similar to the Insulation type than the Marine Goods plan had been, it met at once with vigorous objection. Two conferences and revisions failed to remove points on which Research and Planning and Consumers' Advisory Board took issue. Finally on April 5, 1935, the Code Authority declared the objections insurmountable and requested suspension of all further action on merchandising plans until Congress should take action on the future of NRA. Although two later Code amendments included standard provisions respecting mandatory budget and child labor clauses and permitted incorporation of the Code Authority, no other significant action on the Cork Code transpired previous to May 27, 1935.

4. Article VIII, Section 1, 2 and 6.

The Code provisions which precipitated the industry's difficulties with plans are found under Article VIII - Merchandising Plans, and the following sections (1, 2, and 6) outline the structure as originally intended: (**)

> "Section 1. The Executive Committee of each divisional group of of the industry shall, with the approval of a majority of the members of the division representing at least seventy-five percent (75%) of the dollar volume of the division's sales for the preceding six (6) months' period, prepare its recommendations as to the form and provisions of a merchandising plan to be followed by each individual member of the division concerned, which recommendations shall require each individual member of the division in filing his own merchandising plan to submit:
>
> (a) His basic price list.
> (b) Complete schedules of discounts, including extra quantity discounts, if any.

(*) Byron E. Ball, Asst. Deputy - Report to NIRB on Insulation Merchandising Plan, January 15, 1935. (NRA files)
(**) Approved Code, pp. 56-57

(c) Terms of sale.
(d) His classification of the trade.
(e) Lists of the various grades of all products which he proposed to offer for sale.
(f) All other conditions in any way affecting any transaction or sale of the products of the division.

"In addition to the foregoing information the Executive Committee of any Division may require the submission by the individual members of such division of bona-fide samples of each grade of the products offered for sale, where varying the quality can be used to obtain a competitive advantage. All such recommendations and merchandising plans prepared by the Executive Committee shall be capable of uniform application with the respective divisions and shall be submitted to the Code Authority and the Administrator for approval, and upon such approval shall have the same force and effect as any other provision of this Code.

"Section 2. Within fifteen (15) days after the approval by the Code Authority and the Administrator of the Executive Committee's recommendations and merchandising plans as provided for in Section 1 of this Article, each individual member of the division concerned shall file with the Secretary his plan for merchandising which shall supply the information required and shall be in the form approved by the Administrator. Such plan and any revision thereof shall remain in force unless and until superseded by the filing of a revised merchandising plan, revised price lists and/or discounts. The member's original plan and each revision thereof shall state the date on which it shall become effective, which date shall be not less than ten (10) nor more than twenty (20) business days after filing of same with the Secretary, and each other member of the division may file a similar revision to take effect upon the same date. The original merchandising plan and all revisions thereof filed be each member shall be made available by the Secretary to all other members of the division.

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"Section 6. Many members of the industry sell their products through agents, distributors, jobbers, wholesalers, and/or contractors, while others sell their products directly to the ultimate user. In order to prevent indirect evasion of the provisions of this Article VIII by those members selling through agents, distributors, jobbers, wholesalers, and/or contractors, it is hereby provided that the Executive Committee of each Division of this industry, subject to the approval of the Code Authority and the Administrator, shall prescribe appropriate forms of contracts to be entered into between members of the industry and agents, jobbers, distributors, wholesalers, and/or contractors (excluding retailers) for the distribution of the products of this industry and the observance of such prices and

terms as those currently filed with the Code Authority at which the manufacturer sells such products."

Since the industry's system of distributin its products was to be governed through this system of merchandising plans, the trade practice provisions in the Code itself were general in nature, and for that reason there was no opposition to them although they were not present in the code as originally proposed.

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The experience with regulation of channels of distribution in the Cork Industry under the code will be treated under the following headings: customer classification, resale price maintenance, price differentials, quantity discounts, and discounts other than quantity discounts.

B. Customer classification

The method of controlling distribution through merchandising plans was attacked previous to the public hearing on the Cork Code. Karl Hauck, of the Consumers' Advisory Board, reported after a meeting with the Code Committee on October 12, 1933: (*)

"The representatives of the industry agreed to consider the point and stated that they may remove all reference to a Merchandising Plan from the Code since I assured them the C.A.B. would object strenuously."

At the public hearing of October 25, a representative of the National Retail Dry Goods Association made this statement in objecting to the same point: (**)

"This section proposes that each member classify potential buyers and sets down conditions of sale that must be more favorable than the model plan for the industry provided in Section 2. *** This plan also proposes to fix prices through classification of customers which will fix the conditions of sale by arbitrary grouping of distribution outlets rather than through the customary differences in the elements of sale, the merchandise, or service inherent in the distributors."

R. M. Fulle, of Truslow and Fulle, Inc., Brooklyn, N.Y., supported this objection: (***)

(*) Karl Hauck, Consumers' Advisory Board, report, Oct. 12, 1933, Consumers' Advisory Board Files. (NRA files)

(**) Code Hearing. Transcript, p. 66 (NRA files)

(***) Ibid. p. 107

"In anticipation of the approval of the proposed code a model merchandising plan has been drafted by the Executive Committee of the Cork Stopper Division and distributed to the members. Under this Model Merchandising Plan all customers (and potential or prospective customers) are to be assorted into one of twenty enumerated classifications and depending upon the amount of cork stopper business transacted by each, each is to be designated into furtner subclassifications and given a distinctive letter.

"Jobbers, agents and distributors are also defined, assorted and classified. The concerns presently recognized as jobbers are named and it is provided that 'No additional jobbers shall be established under this classification'. The plan likewise names the recognized agents and distributors and requires them to observe the manufacturer's designated resale prices and provides that 'no further agents or distributors shall be established who shall buy outright from the manufacturer for their own account.'*** To effectuate the prescribed classification of customers, the Plan required that each member of the industry 'shall file with the Secretary a complete list of his customers and prospects indicating the trade classifications of each and indicating also the total sales in dollars made to each customer between July 1, 1932 and June 30, 1933.' "

George B. Haddock, of the Consumers' Advisory Board, recommended the withdrawal of jobbers, wholesalers and importers from the purview of the Code in a report of October 31 to Deputy Administrator R. B. Paddock. The Cork Insulation Co., Inc., sent telegrams and letters to General Hugh S. Johnson asking for his rejection of the Code on the ground of customer classification inimical to the interests of the industry as a whole.

The protesting company received the following assurances from A. L. Faubel, Secretary of the Cork Institute:(*)

"*** I can briefly repeat to you here my assurance to you over the telephone on Monday morning that the provisions of Article VIII, Section 6, of our code relate only to the form of the contract to be entered into between manufacturers and agents, distributors, jobbers, wholesalers and contractors, and this provision does not give the Executive Committee of a division any authority or any supervision over the detail provisions to individual contracts drawn up between a manufacturer and agents, jobbers, distributors, wholesalers and contractors."

As stated above, the Code was approved with general provisions for future treatment of distribution through merchandising plans to be submitted later. All five of the plans submitted were in by early June, 1934, and in every case there ensued immediate objections to the customer

(*) A. L. Faubel, letter to J. H. Stone, Cork Insulation Co. January 13, 1934. Deputy's Files.

classification. Debate was at all times so continuous on the character of the classifications laid down in these plans that no attention was ever paid to Section 23 of Article VII, prohibiting:

> "Incorrectly classifying a customer to enable said customer to obtain a price better or terms of sale more favorable than those stated in such member's filed price list, terms of sale, or merchandising plan as hereafter provided."

Of the Cork Stopper Plan submitted by the industry, J. W. Mackenzie of Consumers' Advisory Board remarked that "it is difficult to believe that any industry would offer a merchandising plan such as this with any expectation that it would receive the approval of the Administrator." He stated that its price control and customer classification "sews up the entire industry", and pointed to the price schedules to manufacturers of electric motors as an example of the uniformity of prices already apparent. Mackenzie also charged that the reason that the industry later eliminated distributors and jobbers from the jurisdiction of the Code was that under the original Code definition the latter would have to be given a hearing. (*) It is true that it was after the elimination of these groups that the merchandising plans were drawn up in such a way as to produce the same control over distributions without affording any opportunity for protests.

I. Cork Insulation.

The W. S. Nott and A. H. Bennett pipe covering contracting companies, of Minneapolis, Minnesota, in opposing the Insulation Plan charged that(**): "The three dominating concerns of the insulation division are inimical to the well-established policy of dealing through agents, distributors, jobbers, wholesalers and/or contractors, because they have their own erection crews operating out of various sales offices...." It was further charged that these dominating concerns controlled 75% of the dollar volume of sales in the division, and the three concerns were dominated by one of their number holding alone 50% of sales and that the policy of all was to discourage the use of independent distributors and contractors. The protesting companies stated that they themselves had already lost preferential discounts by reason of these three companies having already put into operation the merchandising plan, though not yet approved. The following statement was made by H. W. Prentis, President of the Armstrong Cork Company, in defending the distinction between exclusive and non-exclusive distributors which appeared in the Insulation Plan: (***)

(*) Memo., Mackenzie, CAB, to J. A. Hillman, Div. 3, May 10, 1934, Consumers Advisory Board files.

(**) Petition from Nott and Bennett Companies, April 13, 1934 Deputy's Files.

(***) Public Hearing on Amendment No. 1, Transcript, p. 174

> ".....the fundamental reason why we believe in having a classification on prices for exclusive distributors and one for the non-exclusive distributors (is) because the exclusive distributor uses more stuff and hence is entitled to a lower price. Secondly, we believe that any exclusive distributor or non-exclusive distributors, so far as our company is concerned, should have the same price in his classification, regardless of his location, freight and the cost of transportation excluded, that he should be put on a fair basis of competition with anybody else who buys in that classification, and hence instead of making widely varying series of prices to exclusive and non-exclusive distributors, we have two sets of prices which I named..... In our own company I should say that over 30% of our insulation moves through distributors, and we are vitally interested in their welfare."

T. R. Vaughn, of the Legal Division, reported to Jack Garrett Scott, managing attorney, on August 8, 1934, that all the proposed merchandising plans "are diametrically opposed to present NRA policies" in respect to mandatory and uniform classification of trade. (*) Scott replied that the Legal Division should therefore quote Office Memorandum No. 260 and refuse approval. Martin Taitel, of the Research and Planning Division, reported on the Insulation Plan: (**)

> "There are no serious objections to classifying customers as set forth in Parts I to III. It is suggested, however, that a provision be added permitting intermediate and subgroupings by individual manufacturers, providing they file their bases for such groupings."

The provision of the Insulation Plan to which both Advisers objected is (***)

"General Grouping for Classification of Trade a. FACTORY BRANCHES: For the provisions of this plan are hereby defined as direct sales offices of a manufacturer of the products of this Division or of a wholly owned or controlled subsidiary of such a manufacturer.

"b. EXCLUSIVE TERRITORIAL DISTRIBUTORS: For the provisions of this plan are here defined as Distributors of a manufacturer of the products of this Division in a given territory in lieu of a manufacturer's own sales force and operating under contract with one manufacturer for the exclusive distribution of this manufacturer's products within a restricted territory.

(*) Vaughn memo to Scott, Legal Division, August 4, 1934, Legal Division Files. (NRA files)

(**) Taitel, Research and Planning Division memo to Hillman, Div. 3, May 29, 1934. Research & Planning Division Files.

(***) Cork Insulation Plan, June 25, 1934, p. 2. Deputy's Files.

"c. NON-EXCLUSIVE TERRITORIAL DISTRIBUTORS: For the provisions of this plan are here defined as those Distributors purchasing the products of this Division under a specific selling agreement with one manufacturer or said manufacturer's factory branch or exclusive territorial distributor, for resale within a given non-exclusive territory."

Taitel states regarding this section: (*)

> "We do not see the necessity for requiring a purchaser performing a distributor's function to be under contract with one manufacturer before he can be a distributor. Should not anyone performing the functions or services of a distributor be so classified, regardless of whether or not he is performing those functions or services for one or more manufacturers? Also the reason for distinguishing between 'non-exclusive' and 'exclusive territorial agents and/or distributors' is not clear and does not seem sound."

In a brief filed by the Cork Insulation Co., Inc., against approval of this Plan, the following statement appears under the heading "Discrimination between Classes of Distributors":(**)

> "In Section 2-A of Article III, General, a distinction is made between exclusive territorial agents and/or distributors and non-exclusive territorial agents and/or distributors. We object to any differentiation between these two classes of distributors. In the first place, they do not represent separate and distinct steps in the economic scale. In the definitions contained in the plan, these agents are both limited to definite territories and we can see no reason why there should be any division at all. In the second place, it is contemplated from the definitions in the plan that both classes of agents shall be under contract to one manufacturer for the distribution of that manufacturer's products within a given territory. They both perform exactly the same functions and the only difference existing is that one has exclusive distribution within a given territory, whereas there may be more than one non-exclusive agent within a given territory. Of course it is contemplated that there will be a price discrimination between these two classes of agents, but the fact that they are both operating under contract with one manufacturer, are limited to definite territories and perform the same functions, leaves no reason for such a discrimination. These agents and and distributors will be forced to bid against the agents and distributors of other manufacturers and/or the factory branches

(*) Memo. Taitel to Hillman, May 29, 1934. Research and Planning Division Files.

(**) Cork Insulation Co., Brief, June 22, 1934, p. 4. Deputy's Files.

of other manufacturers, so that their efforts on construction work, which will of course be their main business, will be exactly the same. We believe, therefore, that this section should be changed to eliminate the exclusive and non-exclusive features and to combine Paragraphs b and c under Section 2-A of Article III General into one paragraph for agents and/or distributors."

It should be mentioned that the Cork Insulation Company consistently cast the minority vote in its division, being the only member out of the five to oppose the plan. Consumers' Advisory Board not only objected on the ground of mandatory classification of customers, but also because Section 1 of Article VIII of the Code provided for each industry member's submitting a merchandising plan, whereas the Code Authority was attempting to establish mandatory plans.

Despite these major objections Deputy Hooke sent the Plan to Major Berry on August 20 asking that he as Division Administrator give his approval. He stated: (*)

"It was submitted with the approval of all the members of the industry with the exception of one company. The company disapproving the plan is the Cork Insulation Co., Inc., which is controlled by British capital - Lord Vestry and his brother Sir Edward Vestry. They have made numerous approaches to American industry to buy them out, and I am convinced that their opposition to the merchandisng plan is only another move to force the purchase of their interests by some American concern.

"The Armstrong Cork Company, which is by far the largest in the industry and normally does about 75% of the business of the country has voluntarily put this merchandising plan already into effect, and their business has dropped 50 to 60% and are willing to accept this for the welfare of the industry."

(*) Report, Deputy Hooke to Div. Admin. Berry, August 20, 1934 Deputy's Files.

Major Berry wrote to General Johnson the next day, sending on the Plan for approval. (*)

> "May I call your attention to the fact that the code has been disapproved by all of the boards except the Labor Board.
>
> "I join with Deputy Hooke's recommendation. I am prepared to sign the code and submit it to your office, but the objections of the boards are responsible for the delay. If you want me to sign it I will do so and promptly submit it to you."

The Cork Insulation Plan was not approved following the correspondence quoted above. Instead, the Plan was further revised and upon being resubmitted, went to the Advisory Council. There the primary concern was with the form of contract submitted in accordance with Article VIII, Section 6, which will be treated in the section on Resale Price Maintenance. The Council did require that the assent of 85% of distributors be secured, although this was later altered at the request of the Code Authority to 85% by volume of sales and 62-2/3% by numbers. The classification of distributors had been altered to meet the objections raised, and the final reading of the classification was:

> "1. FACTORY BRANCHES, defined as direct sales offices of the Sponsor or of a wholly owned or controlled subsidiary of the Sponsor.
>
> "2. EXCLUSIVE TERRITORIAL DISTRIBUTORS, defined as distributors of the Sponsor in a given territory in lieu of the Sponsor's own sales force and operating under a contract with the Sponsor for the exclusive distribution of the Sponsor's products within a restricted territory.
>
> "3. OTHERS (Note to Sponsor: Insert and define any other types of general distributors, if any.)"

It may readily be seen that the final definition of trade groupings was based on the manufacturer's own classification rather than that laid down by the Executive Committee and made mandatory for the division. As finally approved it was acceptable to all of the five members of the Cork Insulation Division, the Cork Insulation Co. voting also in the affirmative.

(*) Memo. Berry to Gen. Johnson, Admin., August 21, 1934, NRA Files. (Where "code" is mentioned, "Plan" is intended.)

2. Marine Goods.

It has been mentioned above that all the other plans were laid on the table pending approval of that for the insulation group. After the approval of the latter the Marine Goods Plan was submitted. In this plan the only customer classification was on the basis of quantity, the provision reading:

"In the marketing of these products the Sponsor uses the following schedule of quantity brackets in the pricing of his products to all purchasers. These quantity brackets apply strictly to all orders for single shipment and single delivery to the purchaser:

Life Preservers

Less than 12
12-35
36-71
72-143
144-499
500-2499
2500 and more

30-Inch Solid Cork Ring Buoys

Less than 12
12-47
48 and more

Note to Sponsor

"Intermediate classifications between any two of the above quantity classifications may be established by the Sponsor and included in his individual merchandising plan."

There was no objection to this plan.

3. The Cork Stopper.

The Cork Stopper Plan was at great variance with the Marine Goods Plan, being even more rigid than Insulation in its customer classification. The plan as revised and submitted on June 26, 1934, provided the following groupings, with detailed quantity brackets for types 1 and 2:

"1. ALL PURCHASERS OF CORKS except Wholesalers, Jobbers, Distributors and Agents as defined below and further excepting city, State and Federal Government Departments and Sub-divisions thereof who purchase....

"2. WHOLESALERS. For the purpose of this plan, a 'wholesaler' is defined as any individual, partnership, association, corporation, or other firm, or a definitely organized division thereof, definitely organized to render and rendering a general distribution service, which buys or maintains at his or its own business a stock of corks for resale, and which through salesmen, advertising, and/or sales-promotion devices, sells to retailers and/or to institutional, commercial, and/or industrial users, but which does not sell in significant amounts to ultimate consumers and which purchases ....

"3. CITY, STATE AND FEDERAL GOVERNMENT DEPARTMENTS AND SUB-DIVISIONS THEREOF.

"4. JOBBERS, DISTRIBUTORS AND AGENTS

"A 'jobber' is defined as one who sells Corks to all classes of trade in substantial volume, employes travelling salesmen, carries an adequate stock of Corks, and in general performs the same functions in his territory as would a manufacturer's own salesmen or warehouses.

"A 'distributor' is defined as a cork dealer possessing the same general qualifications as a jobber and who in addition is in a more intimate relationship with his source of supply than is the jobber; a distributor usually confines his purchases entirely to one source and is the exclusive representative of that source in a given territory. (The difference between a jobber and a distributor lies principally in the condition that the latter acts more truly as a direct representative of a manufacturer and is substantially an actual substitute for a factory-owned branch office and warehouse.

"Agents. In order to make provision for outlets for members who may not have an adequate sales force, any member may at any time appoint an agent, provided the member does the billing to the customer sold by the agent and otherwise handles the business as his own."

As the plan was revised and submitted on February 1, 1935, following the approval of the Marine Good Plan, the customer classification read: (*)

(*) "1. DISTRIBUTORS, defined as corks dealers who sell corks in substantial volume to all classes of trade, employ traveling salesmen, carry an adequate stock of corks, and in general, perform the same functions in the territory covered as would a manufacturer's own salesmen and warehouses. A distributor usually purchases entirely from one manufacturer and is the exclusive representative of that manufacturer in a given territory.

"2. JOBBERS, defined as corks dealers performing the same functions as Distributors but selling in smaller volume than Distributors. A Jobber does not always buy from one manufacturer and is not the exclusive representative of a manufacturer in a given territory.

"3. WHOLESALERS, defined as those individuals, partnerships, associations, corporations or other firms, or a definitely organized division thereof, definitely organized to render and rendering a general distribution service, which buy and maintain at their places of business stocks of Corks for resale, and which through salesmen, advertising, and/or sales-promotion, sell to retailers and/or institutional, commercial and/or industrial users, but which do not sell in significant amounts to ultimate consumers.

"4. CITY, STATE AND FEDERAL GOVERNMENT DEPARTMENTS AND SUBDIVISIONS THEREOF, defined as any governmental department or bureau, including governmental institutions, purchasing corks.

"5. ALL OTHER PURCHASERS

****

"The Sponsor reserves the right at all times to appoint new distributors and/or jobbers and agrees that any new distributors and/or jobbers which the Sponsor may appoint will conform to the above definition of distributors or jobbers, as the case may be, and will be prepared to conduct their business on a basis comparable with distributors or jobbers now functioning as such."

In this last version of the plan quantity classifications were established for groups 3 and 5. The right of establishing intermediate classifications was reserved to the sponsor, but the exercise of this right was limited to twice annually, January 1 and July 1. 'Manufacturers' distributors' was defined to mean distributors and jobbers as defined. Consumers' Advisory Board objected to the distinction thereby established between manufacturers' distributors and wholesalers, and it also disapproved "rigid quantity classification of wholesalers." (*)

(*) Reed K. Pond, CAB to Ball, Asst. Deputy, memo., Feb. 14, 1935 Consumers' Advisory Board Files.

The Cork Stopper Plan was intended by its proponents to follow a course through NRA similar to that of the Insulation Plan. As in the case of the Insulation Plan and for the same reason an amendment to Article VIII was required, and the Code Authority accordingly proposed amendments which would make the earlier ones also applicable to corks. But in this case the industry would not amend the customer classifications to the satisfaction of the advisory boards, and the conferences which were held in an attempt at reconciliation of these differences prolonged the dispute for another month, until the end of March, 1935. The impending action of Congress on NRA was a factor in the Code Authority's decision early in April to suspend all action on merchandising plans. (*)

4. Bulletin Board and Floor Tile.

Little needs to be said of the Plans for the Bulletin and Display Board and the Floor Tile Divisions. These plans were held in abeyance while Insulation was under consideration, and then again when Marine Goods and Cork Stoppers were given preference. The only action on the Floor Tile and the Bulletin Board plans was in the period prior to August, 1934, when all five plans were simultaneously before NRA for approval. Neither one met with the approval of a majority of the advisory boards.

Of the Bulletin Board Plan Consumers' Advisory Board said: (**)

> "We recommend the deletion of Section 3 since we believe a member should make his own classification of trade if any. Why a member's list of distributors should require the approval of the Division we do not understand. It seems to us nothing short of effrontery to suggest that a member should submit to such power of approval or disapproval."

Even the Industrial Advisory Board, consistently sympathetic to the efforts of the industry to secure its ends, commented in the same regards: (***)

(*) Code History, p. 25

(**) CAB to I.R. Saum, Div. 3, memo., August 21, 1934
Consumers' Advisory Board Files.

(***)Ashley, Industrial Advisory Board, to Hooke, memo., Aug. 5, 1934
NRA Files.

"While your Adviser is personally in sympathy with this condition and realizes the necessity of same to the industry, it must be recognized as contrary to Office Memorandum No. 267, which will make endorsement by the various boards and divisions difficult to obtain."

Since the plan was never returned by the industry, it is impossible to say whether the Code Authority would have agreed to a modification.

Comment on the Floor Tile proposal was almost identical with the above. Consumers' Advisory Board remarked of the classification article: (*)

"We recommend the deletion of this Article since we firmly believe it is within the province of the individual manufacturer to set up his own classification of trade. It has been demonstrated that such classifications as have been made mandatory and uniform have a tendency to freeze channels of distribution, and to result in price fixing."

The Industrial Advisory Board suggested that "the interested parties should have the opportunity to be heard on these provisions. (**)

Information on the operation of the two merchandising plans which were approved is not available. One was amended in respect of its customer classification until it became quite different from what it was originally. The other, Marine Goods, did not lay down a classification by function. However, some of these plans may have been put into operation before their approval and while still in form, objectionable to NRA Advisory Boards. For example, there has been quoted above a communication from Deputy Hooke which commended the Armstrong Cork Company for "voluntarily" putting into effect a version of the Insulation Plan which was distinctly unsatisfactory to NRA. How general this practice was, how effective, and how long continued, is not known, and it is impossible accurately to gauge the attitude of independent distributors toward the classifications which the manufacturers were determined to establish for them.

C. Resale Price Maintenance

Section 6 of Article VIII of the Code, quoted in full above, states that the Executive Committees of the various divisions

"shall prescribe appropriate forms of contract to be entered into between members of the industry and agents, jobbers, distributors, wholesalers, and/or contractors (excluding retailers) for the distribution of the products of this industry and the observance of such prices and terms as those currently filed with the Code Authority at which the manufacturer sells such products."

When the industry first presented a proposed code to NRA, "the industry" was therein defined to include only manufacturers. At the same time, however, it carried provisions (a) that resale buyers should not sell at less

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(*) CAB to Hillman, memo, June 12, 1934 Consumers' (NRA files.)

(**) IAB to Hillman, memo., June 7, 1934. Industrial Advisory Board Files. (NRA files)

than the manufacturer's published prices and terms and conditions of sale; and (b) that distributors of imported cork products should not sell their products at a price lower than that of the domestic manufacturer's lowest price. The Code Analysis Section immediately objected to the first proposition; and of the second the Consumers' Adviser reported on September 12, 1933. (*)

> "I objected strongly to this on the following grounds: price-fixing, raising the cost to the consumer, and non-representation of the importers in the membership of the association, said association being a purely manufacturers' association. This clause was then omitted from the code, but the Deputy (Paddock) then suggested that the wording of Article II, Section 1, be changed to include all wholesaling of the Cork Products and then that would include the wholesalers automatically. I objected to this also, for they would still be unrepresented and it would still be price-fixing, detrimental to the consumer. Thereupon it was suggested that the Importers be notified of the Public Hearing and then they could object if they so wished. I am very suspicious of this industry and believe they will try by devious means to include many bad features in their next code. Possibly if the Legal Adviser had been present I would have received his aid and any inclusion of this in any form would have been ruled out of the next code."

At the Code hearing, where the proposed code appeared with distributors included in the industry definition and with control over resale prices provided for, it was attacked by a representative of the National Retail Dry Goods Association who declared that "it gives the right to members of the industry to extend the control of prices through their agents and wholesale distributors, thus creating a vertical control...." (**) H. W. Prentis, President of Armstrong Cork Company and Chairman of the Code Committee replied: (***)

> "...unless some such provision as this be provided it is very clear to me that industry generally will be faced with two alternative, one, to set up its own branch warehouses and its own factory controlled branches in every important center in order that they may exercise control of the price to the point where it leaves the warehouse or that branch office and reaches the user... We cannot exist half with binding open prices on the manufacturer who sells his goods straight to the person who uses them and with the other half of the industry functioning through agents or salesmen who, in turn, are thoroughly free from any control and can be used as a smoke screen .... They use the agent to do the thing that the manufacturer himself under his filed prices is unable to do."

The result of the hearing was that Article VI, Section 9, reading:

(*) Karl Hauck, Consumers' Advisory Board, Report, Oct. 12, 1933 Consumers' Advosory Board Files. (NRA files)

(**) Code Hearing, Oct. 25, 1933, Transcript, p. 68 (NRA files)

(***) Ibid. p. 80

> "The Code Authority, subject to review by the Administrator, shall regulate the sales to jobbers, agents or wholesalers who fail or refuse to observe the resale prices designated by the members of the industry."

was replaced by Article VIII, Section 6, before quoted. The Consumers' Advisory Board, recognizing that the difference was mainly one of wording, continued its opposition. Deputy Paddock in submitting the Code to General Johnson for his approval wrote. (*)

> "The Consumers' Advisory Board also objects to Article VIII, Section 6, regarding the maintenance of resale prices. This provision does not exactly maintain resale prices and is only designed to give the industry permission to submit contracts to the Administrator for his approval. This would maintain the manufacturer's price to an ultimate purchaser where the manufacturer is selling direct."

In view of the fact that the prices filed would be those to the ultimate consumer, and that distributors would receive discounts, Paddock's inference that the system would apply only "where the manufacturer is selling direct" does not seem quite accurate. Be that as it may, the Code was approved without change, although unqualified approval had been registered only by the Legal Division and the Industrial Advisory Board. The Industrial Adviser was Hugh M. Clarke, Vice President of the Armstrong Cork Company. It is clearly apparent that the resale price maintenance was designed to be most advantage to the establishment selling direct and Armstrong Cork Company was the greatest user of factory branches and warehouses.

(*) Paddock to Johnson, memo, Dec. 27, 1933. NRA files

1. Cork Insulation.

Although there had been no significant industry opposition in the making of the Code, it appeared early in connection with the Insulation Merchandising Plan. G. C. Woodworth, President of the Cork Insulation Co., complained to the Industrial Advisory Board that (*):

> "The Merchandising Plan referred to above is designed with the purpose of eliminating agents and distributors and placing the marketing of the products in the hands of factory owned branches. This ... is detrimental to the interests of our marketing policy and is definitely monopolistic in character. In fact it is the avowed purpose of the supporters of this Plan to create a monopoly and to control all resale prices."

Churchill, who had succeeded Clarke as Industrial Adviser by March, 1934, added "I do not think that in a code any attempt should be made to carry set prices through the outlet to the consumers". (**) Research and Planning Division, Consumers' Advisory Board, and Legal Division also complained vigorously at the subjection of distributors to .... manufacturers; they were unanimous in expressing the belief that the proposed contracts were designed solely for resale price maintenance. This combined protest produced the public hearing of June 22, 1934, which resulted in the deletion of distributors and jobbers from the jurisdiction of the Code. The real struggle at this hearing, however, took place over the issue of the retention of Article VIII, Section 6.

A. L. Faubel, Secretary of the Code Authority, led the supporters of the distributor contract system, and marshalled representatives of the six divisions of the industry, thirteen in all, in a plea for its maintenance. The argument was summarized by K. W. Prentis, the President of Armstrong Cork, who stated that the plan did not fix prices but merely secured uniformity between local jobbers and manufacturers' branches (or theoretical manufacturers' branches). (***) L. K. Ross of the Cork Insulation Company pointed out the paradox of eliminating jobbers and distributors from the Code and at the same time continuing the section which bound them by contracts, and in this he was supported by the Consumers' Adviser. Martin Taitel of Research and Planning had questions to ask, and H. H. Bruns of L. Mundet & Son, selected by Faubel to answer for the industry, revealed in replies that general price policy on corkboard was to follow the leadership of the largest company in the industry, that price changes were made effective as of identical dates, that distributors generally abided by manufacturers' published or quoted prices. (****) It was also indicated that the industry had been operating

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(*) Cork Insulation Co. to IAB, Letter, March 13, 1934. Industrial Advisory Board Files. (N.R.A. files)

(**) Churchill to IAB, Report, March 20, 1934. Industrial Advisory Borad Files. (N.R.A. files)

(***) Hearing on Amendment No. 1, Transcript, p. 7

(****) Ibid., p. 168

on a zoning system. The Cork Insulation Co., the only member of the Insulation group opposing the plan, expressed this view: (*)

"We are quite willing, as we have indicated before, to insist that our distributors abide by our published prices to customers, but we are decidedly opposed to publishing the terms of agreements with our distributors. ... We believe we should be left in a position to bargain with those distributors who have established themselves in the business over a period of years rather than be placed in a position of quoting them on the basis of published prices which would place our competitors in a position to meet or underbid such prices. It has been definitely stated by our competitors that they would prefer to eliminate all distributors entirely as they are desirous of creating a monopoly within the industry."

The result of the hearing was that Deputy Hooke decided that the deletion of jobbers and wholesalers from the Code was in order, but that there had been a showing of economic necessity for Article VIII, Section 6. With one exception, the advisory boards disapproved of the latter decision; the Industrial Advisory Board approved of the retention of the section. The Legal Division took a firm stand on the contract system in the case of the Insulation Plan: (**)

> "The entire contract is designed to maintain resale prices of products in the hands of the distributor. As such, it has been contrary to NRA policy since Oct. 25, 1933. It was contrary to policy when this code was approved on Jan. 13, 1934. It is contrary to policy today and in my opinion should not be approved unless you are prepared to justify it as being necessary to the industry from an economic point of view and as being a reasonable restriction in this industry. Such a system of contracts for resale price maintenance is clearly contrary to the Federal Anti-Trust Laws and it is real question as to whether or not Section 5 of Title I of the NIRA sufficiently relaxes the Federal Anti-Trust Laws in view of the fact that Section 3 (a) of the Act provides that no code shall 'permit monopolies or monopolistic practices.'"

a. Code Amendment.

The Code Authority revised the Insulation Plan and submitted a new version of September 10, 1934. Although the Advisory Boards pointed out that resale price maintenance was retained, Deputy Hooke put it through for approval. In forwarding it, he stated in a covering memorandum that the fact of the Code's having been approved with provision for such a contract indicated its acceptability, that the public hearing on the Plan had demonstrated a real need for such a system, that the

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(*) Ibid., p. 78

(**) Vaughan, Legal Division, to Hooke, memo., Sept. 12, 1934. Legal Division Files. (N.R.A. files)

open price plan intended would collapse if factory branches had to compete with distributors who were not regulated on prices. Of the contract itself he said: (*)

> "The form of agreement submitted for approval by the industry is to be used by the manufacturers with their direct and immediate distributors only. These distributors are in all instances large wholesalers, jobbers and contractors and the agreement therefore is not and cannot be the means of resale price maintenance to the consumers through retailers."

This request for approval was nullified by the action of the Consumers' Advisory Board in requesting that the Plan be submitted to the Advisory Council.

The decision of the Council was announced on October 4, 1934, in a memorandum which read as follows: (**)

"The Council understands the basic facts to be as follows:

"Section 6 of Article VIII of the Cork Code provides that the Executive Committee of each Division shall prescribe forms of contract to be entered into between members and agents, jobbers, distributors, wholesalers (excluding retailers) for observance of prices and terms as filed with the Code Authority by manufacturers. This is a form of resale price maintenance.

"The situation in the Industry is that manufacturers' sales are for the most part through two channels: Their own branches and exclusive territorial distributors. Some distributors undersell the manufacturers and their branches, and to the extent that they do so tend to break down the open price plan provided for in the Code. The Industry wishes to prevent this by requiring each member to sell to his distributors only under an agreement or contract requiring the latter to observe the prices posted by the former.

"On the basis of these facts, the Council makes the following recommendations:

"1. The Committee recognizes the inequity of a situation in which manufacturers who may not quickly alter their filed prices compete with distributors who may alter prices at will.

"2. The Committee believes that the logical way to deal with this situation is to bring the distributors under the Code and thereby require them to file their prices. Competitive equality could also be restored by eliminating the waiting period in the Cork Code. We recommend that long-run policy be directed to both of these ends.

(*) Hooke to Johnson, memo., Sept. 15, 1934. Deputy's Files. N.R.A. files)

(**) Advisory Council to Deputy Hooke, memo., Oct. 4, 1934. Deputyts Files. (N.R.A. files)

"3. Immediately, we recommend disapproval of the proposed resale price maintenance contracts on the ground that they seek to give manufacturers the benefits without the responsibilities of an agency contract and to impose upon distributors the burden of conforming to a price provision and to price schedules in whose shaping they have no part.

"4. Because the Code commits NRA to an immediate effort to provide relief by imposing contracts upon distributors, we recommend that, pending code revision, the deputy and industry formulate a contract in which, on condition of receiving from the Code Authority all filed price information at the same time and on the same terms as the members of the industry, distributors undertake to file, without a waiting period, their own price terms. Alternatively, we recommend approving the resale price feature of the plan on a permissive, not a mandatory, basis."

The Code Authority on October 24 returned with amendments to Article VIII which were designed to make the Insulation contract possible. This proposal was opposed by Consumers' Advisory Board on the grounds that instead of accepting one of the Council's alternatives the industry had incorporated both the permissive contract and the distributors' price-filing system. Research and Planning also took exception to the amendments, and yet the amendments suggested by these advisory groups were not forwarded to Deputy Hooke. I.R. Saum, Assistant Deputy who had received the proposals, wrote: (*)

"The proposed amendments contain certain resale price maintenance provisions which are taken exception to by the Research and Planning Division and the Consumers' Advisory Board.

The advisors who attend the public hearing will, of course, be entitled to suggest certain modifications, which you may consider before forwarding the amendments to the National Industrial Recovery Board for approval."

At the public hearing of November 13 there were no distributors present and the only objections came from the Cork Insulation Co. But after the hearing Research and Planning, Consumers' Advisory Board, and the Legal Division continued the attack. Vaughan of the last-named agency declared that the requirement by the coded manufacturers of price filing by uncoded distributors was illegal, and that the permissive resale price maintenance provision, while legal, was contrary to policy. It was again requested that the Advisory Council review the matter.

On December 13, 1934, the Council made its stipulations to the effect that the amendments be limited in their application to the Insulation Division alone, that the industry choose between the alternatives previously suggested by the Council, and that provision be made so the manufacturer would not become a violator in the event his distributor should refuse to sign a contract. Further revision was made in

(*) Saum, Asst. Deputy, to Hooke, Memo, Oct. 29, 1934
Deputy's Files. (N.R.A. files)

accordance with these suggestions, and the Insulation Plan was approved together with the amendments on January 16. In its final form the plan was not accompanied by a contract to be used by distributors; an amendment to Article VIII applying only to the Insulation Division was affixed to the Code, which included: (*)

"Section 4. No member of a division for which a merchandising plan shall have been approved by the National Industrial Recovery Board shall sell any product of said division to or through any distributor or distributors, after fifteen (15) days after the approval of said merchandising plan, unless and until said distributor and/or distributors shall have entered into a separate written agreement, which agreement shall contain the following provisions:

"(a) That such manufacturers' distributor shall forthwith issue and file with the Secretary his or its price list or lists, including therein all prices, terms, rebates, discounts, allowances and conditions of sale and any revisions thereof which may be made from time to time, relating to or affecting the sale or offer to sell of any of the products of the division concerned, to all classes of customers.

"(b) That said price list or lists, terms, rebates, discounts, allowances and conditions of sale, and any revisions thereof, shall become effective immediately upon receipt of same by the Secretary.

"Copies of all such separate agreements so executed shall be filed with the Secretary within five (5) days following the date of their execution. Immediately upon receipt of the price terms of such manufacturers' distributors, the Secretary by telegraph or telephone, or other equally prompt means, shall notify such manufacturers' distributor filing the same of the time of such receipt and all such price terms and revisions thereof shall be immediately and simulataneously distributed by the Secretary to all members of the division and to such manufacturers' distributors who have filed price terms or revisions thereof for the sale or offer to sell of similar products, and the same shall be made available to all customers affected thereby who have applied therefor and have agreed to defray the cost actually incurred by the Code Authority in the preparation and distribution thereof, and the same shall also be available for inspection by any of the said customers at the office of the Secretary.

"Section 5. The provisions of Section 4 of this Article shall cease to be effective sixty (60) days after the date of the approval of this Amendment, unless within that time manufacturer's distributors of the products of the Cork Insulation Manufacturers' Division, to the extent of 75% by number and 85% by volume of business, file with the National Industrial Recovery Board their assent to the provisions of said Section 4."

b. Assents of Distributors.

(*) Amendment No. 2 to Cork Code, Codes of Fair Competition, Vol XX, p. 271

Article II of the Code was amended by the addition of a new Section which provided that "whenever used in this Code the words 'manufacturers' distributors' shall have the meaning within each Division as defined in the Merchandising Plan for that Division". The amendments and the Plan both were approved over the dissents of advisory agencies which still insisted that the result would be resale price maintenance in the cork industry, and that there was no authority for manufacturers to lay down stipulations binding upon unrepresented distributors. Although the form of the Deputy's report forwarding the proposals to NIRB for approval does not include these dissenting reports from advisers, a penciled notation reads "Board Reports included later at Grime's request." On March 29, 1935, the Code Authority forwarded the assents of the requisite proportion of distributors, but there is no data to indicate whether the plan ever officially went into effect before May 27. These assents raise an interesting point. It has been mentioned immediately above that "manufacturers' distributors" was to have the definition accorded the term by each individual Division. The Insulation Plan defined it to include:

1. Factory branches
2. Exclusive Territorial Distributors
3. Others (to be inserted by the sponsoring company)

This definition could therefore be very broad or extremely narrow, depending upon whether the few firms in the Division chose to write in "Others". Should they by some chance fail to write in additions to the two main groups the only genuine "manufacturers' distributors" would be factory branches and exclusive distributors, and these classes of distributors would be characteristically amenable to the desires of the manufacturers.

The assents submitted were 116 out of a total of 126 manufacturers' distributors listed. Ten failed to reply and one dissented. There was thus one objection from 127 manufacturers' distributors, and the Code Authority was able to report the assent of 91.3 per cent by number and 99.3 per cent by total volume of business, evidence of extraordinary harmony between manufacturers and distributors. Following is the number of manufacturers' distributors listed by each member of the Division and the number of such distributors who are factory branches.

	Manufacturers' Dist.	Factory Branches
Armstrong Cork Co.	24	13
Cork Import Corp.	16	3
Cork Insulation Co.	36	9
Mitchell & Smith	16	3
L. Mundet and Son	28	16
United Cork Co.	7	None

The one dissent came from the Nashville (Tenn.) Sales Co., a distributor for United, and stated that whereas the firm felt that the Plan would limit its freedom it would "voluntarily" assent should a majority of other distributors approve.

2. Marine Goods.

It was the plan of the industry that the example of the Insulation Plan be followed by other merchandising plans proposed by the industry. The next plan to come before NRA was that for the Marine Goods Division. This, however, being a rudimentary outline of the price-publishing method to be used, was not concerned with distributors and thus contained nothing of resale price maintenance. Therefore little discussion of the plan ensued and it was promptly approved.

3. Cork Stopper.

When the Cork Stopper Plan was presented on February 1 the Legal Division, Consumers' Advisory Board, and Research and Planning Division all pointed out that it was similar in nature to the Insulation Plan and that it, too, could only be approved after Code amendment. The Code Authority prepared an amendment designed to make the leeway given the Insulation Division applicable also to stoppers, but the advisers maintained the same objections that they held in the former case. Research and Planning in its comment said: (*)

"The execution of an agreement between manufacturers and distributors (the agreement not being subject to the Administration's approval), together with the coincident filing of price terms by manufacturers and distributors with the identical agency (not an impartial and disinterested agency) we believe is well designed to effect price fixing and resale price maintenance, both of which are contrary to established policy and the latter, under certain conditions, in violation of law.

****

"The filing of Schedule A, a list of all of a manufacturer's distributors and jobbers, with discounts off list prices at which Sponsor sells to each, is objectionable. Schedule A, being an integral part of the plan, makes known to each manufacturer and manufacturer's distributor all terms of sale under which each does business, thus strengthening the monopolistic tendency of the amendments and merchandising plans considered together, and stifling free, open competition."

After two conferences with the advisers the Code Authority could come to no agreement, a circumstance easily understandable in view of the Division's insistence on a form of price control over distributors. When it was then decided by the industry that it would abandon the effort to get the plan through, Faubel, the Code Authority Secretary, expressed the resentment of the industry over the fact that the whole debate would seemingly have had to be gone through again instead of the present plan automatically following the same course as the Insulation Plan. Assistant Deputy Ball replied on April 10: (**)

"At this time it might be well to point out the fact that this Plan as submitted is not similar to the plan for the Cork Insulation Division. Several new paragraphs, such as consignment selling, filing of agent's commission, limitation of classification, quantity classification and lack of clarity in the distinguishing between distributors, jobbers and wholesalers and all other purchasers are points which differ materially from the approved plan for the Insulation Division."

(*) Kinnear, Research and Planning, to Ball, Asst. Deputy, report, February 25, 1935. Research & Planning Division Files. (NRA files)

(**) Ball to Faubel, Secretary, Code Authority, letter, April 10, 1935. Deputy's Files. (NRA files)

It may be noted that the point on which the two plans did not differ, attempted resale price maintenance, was a paramount objection in the minds of the advisers who had blocked passage.

The Bulletin Board and Floor Tile Merchandising Plans, which received no further consideration after August, 1934, were also charged with resale price maintenance by the advisers who took issue with them. Each provided for a uniform contract based on Article VIII, Section 6 of the Code, and each used the contract to control the distributors' prices.

The industry's attempt at resale price maintenance can be traced easily from the simple provision in the proposed code, through the debated Article VIII, Section 6, and down to the open price system for distributors which finally entered the Code for the Insulation Division's use. The Code Authority erred in believing that the Advisory Boards would be satisfied with a concession in appearances and method, whereas in truth the latter's opposition mounted all through the Code period. However, one important fact remains unknown -whether or not resale price maintenance was in effect during the time of the discussions and debates in Washington.

D. Price Differentials

Because it is not known whether the open price system ever went into effect, the two merchandising plans approved having come so late in the Code period, one cannot ascertain the nature of price differentials. Neither the Code, the merchandising plans, nor the distributor contracts made any reference to the subject. The only basis on which a discussion can rest is inference from the customer classifications sought by the industry.

It appears from the proposed merchandising plans and the discussions with regard to resale price maintenance that the use of exclusive distribution agencies has been on the increase. The Armstrong Cork Company, a great power in the industry, distributes mainly through factory branches. Smaller companies not financially equipped to maintain this expense have apparently coupled with the use of a few such branches a dependence upon distributors who handle exclusively the products of one manufacturer. Going further down the economic scale, manufacturers whose products will not support exclusive distributors obtain the services of jobbers who carry other manufacturers' lines. Wholesalers doing a general distribution business are available for all. In addition to these regular distribution agencies there are industrial users who purchase the products of the industry for incorporation in their own fabrications.

The discussion of customer classification in the merchandising plans as given above indicates that the Insulation division contemplated originally only three types of distributors: factory branches, exclusive and non-exclusive distributors. Undoubtedly it was planned that in that order preferences in price differentials would be established. Resale buyers were to receive a better price than consumers on direct sales. One of the reasons for believing that this Plan was put into effect before it was approved is the protests from contractors who declared that they had been deprived of preferential discounts.

In the Cork Stopper Division the situation was similar. The June 26, 1934 version of the proposed merchandising plan stated parenthetically in its customer classification that "The difference between a jobber and a distributor lies principally in the condition that the latter acts more truly

as a direct representative of a manufacturer and is substantially an actual substitute for a factory-owned branch office and warehouse". It seems likely that "the more intimate relationship with his source of supply" which helped define a distributor was repaid with a concession in price. Only "Wholesalers" and "All other purchasers" were bound by quantity distinctions with regard to their further classification.

It seems fairly definite that while there was debate on the customer classifications to be written into merchandising plans, the real issue underlying was the stabilization of price differentials. With the industry stratified by definition the discount structure would quickly conform. The trend in the industry being toward manufacturer control over distribution, the distributive agencies having the "more intimate relationship" would receive preference over, for example, a wholesaler who could by nature make different manufacturers bid for his business. It was precisely to prevent the latter contingency that the merchandising plans were submitted.

Inasmuch as no price differentials were mentioned either by the industry or by NRA during the Code period, and any specific information on margins in the prices to various classes of distributors is lacking, much of the above is conjecture. However, considering the fact that all of NRA's dealings with the industry were based on conjecture, it may deserve some attention.

E. Quantity Discounts

1. Marine Goods.

The Cork Code made no specifications concerning quantity discounts, that matter being left to the merchandising plans. Of the two plans approved, that for Cork Insulation did not specify quantity brackets; it left that for the individual division member to fill in. However, the Marine Goods plan did establish quantity brackets, although the Sponsor was permitted to insert intermediate classifications.

Life Preservers	40-Inch Solid Cork Ring Buoys
Less than 12	Less than 12
12-35	12-47
36-71	48 and more
72-143	
144-499	
500-2499	
2500 and more	

The privilege of individual members to make different classifications was probably the result of Consumers' Advisory Board objection to the establishment of mandatory quantity classifications on the division from above. The remark made by Professor J. D. Magee, Administration Member of the Code Authority, relative to the making of such a change in the Insulation Plan, may apply here. He said of the Individual member's ability to exercise the prerogative: "Whether he will do so or not in view of the close agreement is another question." (*)

(*) Magee, Administration Member, Code Authority, to Ball, letter, September 17, 1934. Deputy's Files.

2. Cork Stopper.

The Cork Stopper Plan which was rejected by the Advisory Boards in February and March, 1935, carried the following quantity classifications, they being established for only these two groups of purchasers:

"Quantity Classification of Wholesalers:

1. One singleshipment to one purchaser at one destination of:

(a) 100,000 corks or more exceeding $1,000 net in value
(b) 50,000 " " " valued at $500.00 net or more
(c) Less than 50,000 corks or less than $500.00 net

"AND/OR

Shipments in any quantity to wholesalers who purchase:

(a) $10,000 net or more per annum
(b) $ 5,000 to $9,999.99 per annum
(c) Less than $5,000.00 net per annum.

****

"Quantity Classification of All Other Purchasers

1. One single shipment to one purchaser at one destination of:

(a) 100,000 corks or more exceeding $1,000.00 net in value
(b) 50,000 corks " " valued at $500.00 net or more
(c) 10,000 " " " " " $100.00 " " "
(d) 5,000 " " " " " $ 50.00 " " "
(e) Less than 5,000 corks or less than $50.00 net in value

"AND/OR

2. Shipments in any quantity to purchasers of:

(a) $10,000.00 net or more per annum
(b) $ 5,000.00 to $9,999.99 net per annum
(c) $ 750.00 to $4,999.99 net per annum
(d) 300.00 to $749.99 net per annum
(e) Less than $300.00 net per annum"

These classifications were considerably more lenient than those proposed in the first merchandising plan submitted, of which a Research and Planning report said: (*)

(*) Taitel to Hillman, memo, May 14, 1934. Research & Planning Division Files. (NRA files)

"This division regards as economically unsound any rigid and artificial classification of customers which is obligatory on all members of an industry. Such methods tend to freeze channels of distribution and thereby develop inefficiency in distribution. By forcing each manufacturer to use a fixed customer classification, no leeway is permitted for granting discounts or prices in accordance with the different services which may be rendered by a customer to different manufacturers."

"The requirement of $10,000 of purchases for jobbers and $20,000 for distributors is extremely arbitrary and seems to be unfounded. Are there not small concerns performing the functions or services of jobbers and distributors which purchase less than the stated limits?

"The requirement of 'specific evidence' of jobber or distributor capacity for new jobbers and distributors by placing contracts for $5,000 and $15,000 respectively seems unfounded. Small firms might find this a practical prohibition on entering the field. An added force is given to such practical prohibitions by 'H(a)' providing that specific future delivery contracts shall be limited to a period of three months."

It would appear that customers were to be classified and those most favored given preferential price differentials; wholesalers and "all others" could get better discounts in their own class on the basis of quantity but it is a question whether they could buy on as favorable terms as distributors or jobbers, quantities being equal. The amended Stopper Plan did not set a minimum quantity bracket for distributors or jobbers, as was originally done, but by stratifying the other classes a similar effect was achieved.

The Floor Tile and Bulletin Board plans did not specify quantity groups but left them to the manufacturer in filing his prices.

Since there is no knowledge of the methods of the industry with regard to quantity discounts in the pre-code period, and since the margins in discounts contemplated by the industry under the merchandising plans were not published, one cannot perceive the effect of the groupings given above.

F. Discounts other than quantity discounts

1. Unfair Practices

The Cork Code under Article VII - Trade Practices - listed the following prohibitions designed to prevent price discrimination:

"8. To inform a customer or customers, either directly or indirectly, concerning any increases or decreases in prices or changes in discounts prior to the effective date of such new prices or discounts.

* * *

"13. Protecting contracts against a decrease or an increase in price except as to the unshipped portion of such contracts.

* * *

"15. Stating in the invoice of any product as the date thereof a date later or earlier than the date of the shipment of such product, or including in any invoice any product shipped on a date earlier or later than the date of such invoice.

"16. The making of any loan to a customer by any member of the industry or his employees for the purpose of inducing the sale of goods.

* * *

"18. Performing any extra operations on products such as, but not limited to, branding cork stoppers, paraffining cork stoppers, cutting half sizes, dyeing attachments to cork stoppers, shaping cork stoppers, and packing in units less than the accepted standards, without making an adequate charge to cover the cost of such operations.

" 19. The subnormal pricing or the granting of a reduced price, rebate or other concession on articles not specifically mentioned in this Code to influence the sale of articles covered by this Code.

"20. Supplying special service at reduced rates or gratis, such as service of construction superintendent or foreman, or the loan of equipment as an inducement toward making a sale of materials.

* * *

"22. Accepting or offering to accept securities, bonds, mortgages, or stock as whole or part payment for material sold or work performed as an inducement to obtain an order."

Article VIII, Section 5 specified:

"No member of the industry shall sell or offer to sell under customer's private labels, or otherwise, qualities other than those which he has filed with the Secretary as provided in this article, or use grading of qualities as a method of giving buyers extra value over that provided in the member's published grades and terms."

Of this last section it was said at the Code Hearing:(*)

> "This paragraph ... will limit the right of retailers to obtain from the industry any special order or special quality that may be found necessary to meet the consumer's demand. In addition, its presence in the code aids in bolstering the price fixing plan whereby retailers are limited to securing for their customers only what the manufacturers see fit to manufacture and at the price the members of the industry have agreed to charge."

Truslow and Fulle, Inc., an industry member, joined with the Consumers' Advisory Board in supporting this objection. But the reply made by H. W. Prentis of the Armstrong Cork Company seemed to bear more weight with the Deputy Administrator. He said:(**)

> "It is a situation to find uses for all the side product as it comes through the cork manufacturing plant, particularly in the making of cork stoppers. Very often there is a production of what is here denominated a side product with respect to which, unless there is extreme care used in its merchandising, leaves an absolute chaos and complete destruction of the price structure, upon which, in turn, as you gentlemen so well know, the ability of this industry and every other industry in the last analysis must rest if it is to pay the right sort of wages and the right sort of compensation generally.."

There was no mention of this or the other trade practice provisions on price discrimination subsequently; the attention of the industry and NRA was devoted exclusively to the merchandising plans and more particularly to the practices discussed earlier in this report.

2. Freight Charges

An important matter which received scattered attention, however, was the freight system. Research and Planning had this to say of the first Insulation plan:(***)

> "The zoning scheme for quoting prices is objectionable. Considering the organization of the industry and the price leadership of Armstrong, it will tend to function so as to make the Armstrong factory a basing point - that is, function on a 'Pittsburgh plus' basis.
>
> Also it must be recognized that zones could be allocated to manufacturers by simply arranging beforehand which manufacturer was to quote the lowest price in a particular zone."

(*) R. A. Martino, Code Hearing, Oct. 25, 1933, Transcript, p.63 (NRA files)

(**) H. W. Prentis, Code Hearing, Oct. 25, 1933, Transcript, p.79 (NRA files)

(***) Taitel to Hillman, memo, May 29, 1934, Research and Planning Division Files. (NRA files)

The Consumers' Advisory Board also objected, on the ground that delivered prices established on that basis would not always represent actual cost of delivery from the plant making the shipment. Although provision for zoning was deleted, the following statement, the only available exposition of the industry's point of view, is interesting.(*)

> "1. In estimating freight from seaboard to destination consideration must be given that 1700 pounds of raw material is required to produce 750 to 800 lbs. of finished stock. Freight on raw materials from seaboard to inland plants at Beaver Falls and Detroit equivalent to ½¢ per bd. ft. at Beaver Falls and $.0037 per bd. ft. at Detroit.
>
> "2. If provisions for zone delivered prices are deleted from Merchandising Plan cost to Code Authority for investigation of freight differentials used on individual quotations by members of industry will be exorbitant.
>
> "3. Freight equalization has been practiced in industry for 20 years irrespective as to location of manufacturer's plant.
>
> ***************
>
> "Our present method of selling cork insulation on a zone delivered price basis is a practical plan which differs from the so-called Pittsburgh Plus plan in that the basic raw material used in the manufacture of cork products is of foreign origin, and cannot be secured on a commercial basis locally. It necessarily enters this country through the seaboard ports and is shipped inland to manufacturing plants.
>
> "Zone rate differentials are based on rates secured from some 650 different points throughout the United States, East of the Rocky Mountains. In setting up zone delivered prices zones were established so that a fair average freight differential is applied to each and every given zone. Actual investigation of freight differentials applied to carload and less than carload shipments of cork insulation to twenty-five different points chosen at random throughout the United States shows that the average less carload differential added is some $.0017 less than the differential obtained by using actual published tariffs and on carload shipments this differential is approximately $.001."

When the changes were made in the merchandising plan their nature was described by the Industrial Adviser: (**)

> "Published prices on a delivered basis are no longer mandatory. Terms of payment are no longer mandatory, each member of the industry may formulate his own terms. No limitations as to time within which truck deliveries must be made, provision as to policy with regard to cooled orders left to the members of the industry.

(*) Unsigned statement, "Zone Delivered Prices" in Dennty's Insulation folder, July 20, 1934. (NRA files)

(**)Ashley to IAB. report, Sept. 13, 1934. Industrial Advisory Board Files. (NRA files)

"The Consumers' Adviser stated that apparently all the features of the former plan which were objectionable to the Consumers' Advisory Board had been eliminated."

The Marine Goods Plan made no reference to delivery charges. The Bulletin Board Plan, as last submitted on August 6, 1934, attached a complete list of freight differentials to be added, by states, for mounted and unmounted cork. The Consumers' Advisory Board challenged this provision. The Industrial Advisor upheld it, saying that the freight plan had been created by traffic experts from Northwestern University and that "Basing points are the factory locations of the four manufacturers." He stated also that the f.o.b. factory quotations which Consumers' Advisory Board insisted upon would destroy the entire Plan.(*) The Plan was laid away at this point and never again came to light. The proposed Floor Tile Plan did not include specified freight differentials.

The June 26, 1934 version of the Cork Stopper Merchandising Plan carried this provision:

"Freight and Transportation Charges.

"F.O.B. factory and/or branch warehouses, with freight allowed on all shipments of $30.00 or over, provided, however, that freight will be allowed on shipments for the accounts of distributors and jobbers netting $45.00 or more, and provided further that store door deliveries may be made free of charge on all shipments regardless of size in all cities where stocks of corks are carried by manufacturers jobbers or distributors."

This gave further preference to distributors and jobbers; but like most of the provisions designed to favor these groups, it was opposed by Research and Planning and the Consumers' Advisory Board, and did not appear in the latest revision of the Stopper Plan. In, fact, the February 1 1935 Plan made no stipulations on freight allowances.

The efforts of the industry to prevent price discrimination treated in this section are corollaries of their customer classification designs. In view of the difficulties attendant upon giving the latter the status of code provisions, the former were never thoroughly discussed. If it be true that plans were unauthorizedly put into effect, and that industry was accustomed to a zone delivered price basis, then it is possible that means outside the Code were used to prevent price discrimination. However,no information on this subject is available.

(*) Ashley to IAB, report, June 25, 1934. Industrial Advisory Board Files. (NRA files)

III. ANALYSIS

The cork industry, small in numbers and in annual volume of sales, is apparently dominated by the Armstrong Cork Company. This company does more than half of the dollar volume of the industry. It has the maximum number of representatives on the Board of Directors of the Cork Institute, and its President, H. W. Prentis, was Chairman of the Code Committee which presented the industry's proposed Code to NRA. Its second Vice President, H. M. Clark, acted as Industrial Adviser during the Administration's consideration of this proposed Code.

The industry is faced with competition from two directions. The first is from imported products; the second, from American manufactured products which may be substituted for cork. The threat of the former is allayed by the possession, on the part of the three leading American manufacturers, of factories abroad which are as well able as the native plants to take advantage of cheaper labor and physical proximity to sources of raw material. In this wise do the leading American cork companies insure themselves against foreign competition by sharing in the natural advantages possessed by those competitors. But not content with such defense measures, the domestic producers have continually exerted pressure successfully to raise the tariff on all imported cork manufactures, with the result that foreign rivals are increasingly unable to compete in the American market. By operating foreign and domestic factories in accordance with the degree of price competition offered by importers, the large American companies, with the aid of the trend toward revision of tariffs upward, seem likely to free themselves of foreign competition and secure complete command of the American market for cork products. American substitutes for cork, however, must always be combatted with arguments as to price and utility, and with advertising.

Cork manufacturers distribute their products through wholesalers, contractors, direct to the consumer if the volume warrants, and through factory branches. The Armstrong Cork Company has become the great exponent of the factory branch and warehouse method of distribution, and uses this method more than any other cork manufacturer. The older method of dealing through middle-men has also been revamped in order more closely to approximate the factory-branch system. Thus wholesalers have been grouped into classes, the one dealing only in cork products, the other doing a general distribution service for several commodities. If the distributor deals only in cork, he will be encouraged to handle the products of but one manufacturer, and thus become an exclusive distributor for that company. In this case he will be given a preferential discount over other distributors and will be given a territory on which he may sell exclusively. Such a distributor resembles a factory branch very closely, but does not require any investment on the part of the manufacturer.

The trend seems definitely toward a distribution system like that preferred by Armstrong. This envisages a combination of factory branches and exclusive distributors. Non-exclusive distributors of cork products (jobbers) serve a purpose while exclusive distributors are not available, but manufacturers seem bent upon self-sufficiency. A large manufacturer like Armstrong can employ direct sales,

factory branches, and exclusive distributors and thus retain complete control over the distribution of its products, provided other distributors do not destroy this control.

From this point of view, two achievements were possible in a code, one the control of importations; two, the control of distributors. The first problem was presented to Deputy Paddock who pointed out that NRA could not restrict imports. However, he suggested making importers subject to the Code, and the industry was defined to include jobbers and wholesalers. This solution was found to be inadequate inasmuch as the control over economic groups not concerned withthe formation of the Code was strikingly inequitable. So the method was abandoned and "industry" was amended to include only manufacturers. When this amendment was made the Code Authority claimed the original definition originated with the Deputy. Armstrong Cork Company applied its own stopgaps to importer competition by importing the products of its own Spanish factory to offset the difference in price.

Now the industry had disavowed any intention of controlling distributors. But the merchandising plans which were to organize methods of distribution and bind distributors with standard contracts seemed to have that very end in view. Indeed, the industry presented plans for classifying their customers. in the main, distributors, binding them with contracts and establishing resale price maintenance. These plans were consistently supported by the Armstrong Cork Company.

The Code Authority and Deputy Administrator were in harmony as regards the desirability of the plans presented. Opposed were the Advisory Boards of NRA, two or three cork manufacturers, notably the Cork Insulation Co. and a few distributors. The first group pointed out that economic necessity demanded such a system to prevent price cutting by distributors. Their opponents claimed not only that such measures were unnecessary, but that they were designed to produce monopoly control and the elimination of independent distributors. Let us consider the aims of the merchandising plans submitted.

The manufacturers sponsoring the code assumed the control over distributors could be established - whether by inclusion under the jurisdiction of the manufacturers' code, by mandatory contracts, or what not. This assumption, although it was discovered to be an unwarranted presumption, may be granted in order to get a clear view of the merchandising plans.

Distributors were to be classified with the factory branches and exclusive distributors the most favored group. Non-exclusive distributors and jobbers ranked somewhat below, and wholesalers were in the least-preferred class. Thus was definitely indicated the manufacturer's preferment for distributive agencies closely controlled. Because it had been found that the wholesalers, although in a less advantageous position, had been cutting prices in order to maintain sales, it was also intended that all distributors should be bound under the Code to maintain the manufacturers' resale prices. With freight allowances stabilized through a zone delivered price

system, the manufacturers would under this system enjoy control over the distribution and prices of cork products. If all manufacturers were faithful in adhering to the plan, the wholesalers would be unable either to bargain for prices with manufacturers or to cut prices to consumers.

The system seemed to be primarily attractive to the Armstrong Cork Company, inasmuch as that organization was best equipped to profit by it. This company had a well-established system of factory branches, warehouses, and exclusive distributors and had in actuality been maintaining the proposed system, although subject to annoyance from the uncontrolled wholesalers. The manufacturers who patterned their distribution methods after Armstrong also desired the system. It was only the smaller manufacturers who must needs live on the leavings of Armstrong and its satellites that opposed the plan, for to them it meant the outlawing of their best method of staying in exixtence - by striking bargains with jobbers and wholesalers at more attractive rates than the latter could obtain elsewhere. With prices stabilized through the price-publishing system, with definite schedules of customer classes created and discounts fixed, the smaller manufacturer would be unable to make it worth while for the wholesaler to carry his products. The wholesaler, in turn, faced with the necessity of maintaing resale prices on stabilized quotations from manufacturers, would find the price inducement on which he based his economic existence denied to him.

The Cork Insulation Co., greatest opponent of the proposed system, possesses probably the most efficient plant in the industry, it being the most recently built. The company prefers to use independent distributors rather than factory branches since the latter are expensive to establish and maintain. It bargains with jobbers and wholesalers without particular regard to the exclusive or non-exclusive feature and arranges terms for the distribution of its products. Whether, like the great bulk of the industry, it follows the price leadership of Armstrong, is unknown.

The York Ice Machinery Co., largest distributors of cork insulation in the United states, opposed the system also. The distributor it presented little choice; one could become the counterpart of a factory branch as the logical result of adhering to the system, or one could strive for independence and risk the possibility of being unable to secure merchandise. Being a distributor under this arrangement meant almost complete loss of independence and subservience to the manufacturing group. The encroachment of manufacturers, under the leadership of Armstrong, into the field of erection, also threatened to deprive distributors and contractors of an important branch of their activities.

Although the projected merchandising plans were not approved in the form desired by their proponents, the question to what extent they were actually operative is real enough to merit investigation. NRA at no time knew anything enlightening on the subject of prevailing practices in the Cork Industry, and no check on methods under the Code could have been of value without an examination of the pre-code situation. The entire structure of the industry should be examined

for trends, location of power, and physical factors. With this basic information the issues over which NRA contended will begin to assume definite shape and become susceptible of practical solution.

CHAPTER IV*

Brake Lining and Related Friction Products

Division of the Asbestos Industry

I. GENERAL INDUSTRY INFORMATION RELATING TO DISTRIBUTIVE RELATIONS.

The Asbestos Industry was defined by the use of a common raw material - asbestos. The code presented for the industry covered only the manufactures of asbestos products, the most important of which were asbestos paper, cement, magnesia, textiles and friction materials.1/ The latter products were responsible for over half of the industry's dollar volume of sales.2/ The products named above were grouped into "Divisions" by the Code. 3/ Some of the companies in the industry were manufacturers in each of the Divisions and manufactured other products as well. Others were members of only one or more Division. 4/

A. The Products.

The products of the friction materials division were brake lining, transmission lining and clutch facings.5/ The asbestos element in brake lining and clutch facings made them incombustible and no products of any other composition have as yet been commercially developed which may be substituted for them.6/ Less than 5% of the dollar volume of these products were consumed for industrial purposes, the remainder being used in the automotive field.7/ Both brake lining and clutch facings were manufactured in a great variety of sizes, with a large part of the production concentrated into about a dozen sizes for the requirements of the popular, low-priced cars.8/ A standard numbering system for the various requirements, devised by the trade association of the members of the Division and revised annually, had been used extensively for years by the trade.9/ Both brake lining and clutch facings were made in different kinds of material, the two general types

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* This chapter was written by Clayton Gehman.

* The footnotes to this chapter appear in the back.

Note: Unless otherwise noted, the footnote references in this Chapter to "Secretary", "Sub-Code Authority", "members", "Plan", and "Division" refer to the Brake Lining and Related Friction Products Division of the Asbestos Industry. Also all Division "Bulletins", "Memoranda", "Questionnaires", "Confidential Information Bulletins", "Sales Statistics Bulletins", and "Minutes" of Division, Sub-Code Authority and Committee meetings are referred to as being in the Deputy's special ringbinders. There were three ringbinders containing this material that were labelled as follows:

Brake Lining Division	Brake Lining Division
Index Memoranda	Confidential Information
Bulletins Lists	Statistics Miscellaneous
Brake Lining Division	Questionnaires Codes
Minutes of Meetings	

being woven and molded.7/ The dollar volume of the latter had doubled its proportion to the total sales in the period from 1929 to 1933.7/

The replacement demand for clutch facings was much smaller than for brake lining and was often taken care of by the replacement of clutch plates already lined.10/ The replacement demand for brake lining had declined because of quality improvements,11/ but in 1933 it was still responsible for about three-fourths of the dollar sales of brake lining.7/ All of the transmission lining was sold for replacement purposes.7/ The replacement of friction materials required considerable skill and some equipment. The manufacture of clutch facings was controlled to some extent by patents.12/ Clutch facings were responsible in 1933 for about 15%, brake lining about 83% and transmission lining about 2% of the total dollar sales of friction materials. Total sales in 1932 and 1933 were about one-half of 1929 sales.7/ Standardization as to the quality of these products was not far advanced.13/

B. The Production of the Products

Raw materials costs were high in proportion to the value of brake lining and clutch facings because of the large amount of asbestos used in their production.14/ Domestic mines produced only a small amount of the total consumption of asbestos. Canada was responsible for about three-fourths of the total imports and the rest was divided between Africa and Russia until 1932, when imports from Russia ceased. Africa and Russia had the only important supplies of long fiber asbestos outside of Canada.15/

In the manufacture of woven materials, long asbestos fibers were required for spinning and weaving.16/ For molded materials short fibers were used which existed in abundant quantities at low prices.17/ Asbestos prices, particularly for spinning grades, had declined sharply since 1929.18/

There were forty-five companies manufacturing friction materials,19/ about twenty of which had entered the industry since 1929.7/ A number of these were small companies with low overheads who thrived on the buyer's market that existed in raw asbestos and the large distribution margin that prevailed for friction materials.20/ Seven of the members were owned by five other members. Still other members were corporately related outside of this industry. One was owned by an important brake parts manufacturer. Another was owned by a corporation virtually controlling the manufacture and sale of all brake systems. A third was owned by one of the four largest automobile tire manufacturers. Several others were subsidiaries of other automotive or industrial parts manufacturers.21/ The controlling interest in Keasbey & Mattison, one of the largest, who also owned another member, was purchased early in the Code period by Turner & Newell of Great Britain, the world's largest factor in asbestos.22/ Although the large members lost position since 1929,

in 1933 the ten largest made over 75% of the sales, without considering the sales of their subsidiaries.7/

The Brake Lining Manufacturers Association, formerly the Asbestos Brake Lining Association, had 25 members responsible for 85% of the total sales in 1933.23/ The Association had been active for some years in developing standard specifications, list prices and cost systems and a code of ethics.24/ The Association membership was predominately the larger members, who were horizontally and vertically integrated and who had extensive sales organizations.25/

All except a few of the members, who manufactured only transmission lining, manufactured brake lining. About half of the brake lining manufacturers also manufactured clutch facings. Most of the members manufactured other products, which were usually incidental and used to spread selling costs.25/

Integration vertically appears to have been a more important factor than horizontal integration. Johns-Manville and Keasbey & Mattison owned domestic and Canadian asbestos mines.26/ These two companies and another American manufacturer, not a member of the Division, controlled the Canadian price level after 1925.27/ Keasbey & Mattison, however, refused to be governed by a surplus marketing agreement sponsored by the Asbestos Corporation, Ltd., the dominant Canadian producer.28/ Early in 1934 Turner & Newell, who controlled the African production and possibly agreed with Russia to allocate the American market to the African and Canadian producers, purchased Keasbey & Mattison, and market control was strengthened.29/

The shortage and high prices of spinning fibers up to 1930 contributed to the commercial development of molded brake linings in the United States.30/ The manufacture of molded materials short-circuited the textile operations and the ownership controls of mines and mills and lent itself more to large scale operations.30/ It was at this time that American Brakelok, Colt's Patent Fire Arms and Firestone and probably Asbestos Manufacturing, Dewey & Almy and Rex-Hide became important molded brake lining manufacturers. These newer members did not have jobbing connections and their new marketing methods threatened the established channels. Prior to 1930 facilities for the production of asbestos yarns and cloths appear to have been a cost advantage to the members, but after that time market prices for asbestos textiles declined sharply with the expansion of the molded product.31/ About half of the members in 1933 were also asbestos textile manufacturers.25/

C. The Distribution of the Products.

This industry was marked by a very complex distribution system due to a number of factors, among them the low value and infrequency of sale to the average ultimate consumer, the labor service involved

in the final sale, the single price nature of the products, the ineffectiveness of brand advertising, the fairly high value - low weight ratio which operated against any important geographical division of the market, the necessity for national distribution to market the production of the larger members, the large inventory requirements at the point of consumption, etc.

Almost a fourth of the larger members sold some of their production to other members to complete the lines of the latter. Such sales accounted for 3% of total dollar volume of sales in 1933.7/

Over a fourth of the members sold part of their production direct to automotive and industrial equipment manufacturers. Over a fourth of the total dollar sales of the Division were to these buyers. A third of the purchases of these buyers was used for replacement purposes either in the production of their own replacement parts, mostly clutch plates, or for resale through their own dealer outlets to the consumer or to other dealers. Only the larger members sold to these equipment manufacturers and these members marketed the remainder of their production through the regular jobbing trade.7/ In the case of two of the more recently established members, one marketed the remainder of its production through an "affiliate" and mail order houses and the second under its own brand through national distributors.32/ (The term "affiliate" as used in this industry did not imply corporate relationship. It was simply a large distributor marketing nationally or over a large territory under its own brand to most of the same classes of trade sold direct by the members.)33/ Prices on materials sold to equipment manufacturers ran over a third lower than prices to the replacement trade for standard brands.7/ It was maintained, however, by the dominant members that the disparity of these prices was not responsible for any instability in the replacement market price structure; but that any price cutting which existed due to the members not having the original equipment business seeking to secure a larger share of the replacement market.34/ Prices and volume to these buyers had reacted favorably to the pick-up in car production in the season prior to the Code.7/

Besides selling through equipment manufacturing channels, all of the members except one sold under their own brands directly and through intermediaries to the replacement trade. These standard brand sales represented 50% of the total sales of the industry.7/ Probably not more than 15% of the sales of standard brand materials was sold direct to the consumers owning large fleets of buses or trucks. Most of the remainder had formerly been sold through automotive accessory wholesalers and more recently through automotive parts houses, both of whom resold to garages and service stations. Direct sales to small garages and service stations were relatively unimportant. The development of large one-stop service stations in metropolitan areas resulted in their purchases surpassing in volume the purchases of small wholesalers and these stations were re-

ceiving jobbing classifications. Wholesale automotive parts houses in some cases opened retail brake relining shops and in a number of cases created a department with equipment to reline the brake shoes brought in by neighborhood garages and service stations.34/ In order to encourage the jobber to push his particular brand the producer often gave him a fairly exclusive sales territory. Large jobbers often sold to other jobbers and dealers occasionally resold to other than consumers.35/

Because of this mingling of functions and because it was practically impossible to make a separation in sales to a single jobber for the amount which he resold to dealers and other jobbers, preferred jobber classifications were established and volume rebates based on annual purchases were used to recognize the additional marketing services provided by the larger jobbers.36/ One of the largest members had 600 jobbers through whom he reached some 30,000 retail outlets.37/ Another member had about the same number of outlets plus about 500 company stations which serviced consumers directly and each of which served as wholesaler for the independent outlets in the same territory.38/ Another large member sold to the replacement trade through the National Automotive Parts Association, composed of 38 large jobbers with complete warehouses who sold about half of their purchases to other jobbers and the rest to dealers and consumers. This same member used Wagner Electric, the largest distributor in the automotive field, as a national distributor with its 25 warehouse points.39/ A small member largely used, as his jobbers, dealers who sold some material to other dealers.40/

The physical volume of the sales of standard brands was about the same in the season prior to the Code as it was in 1932, and the 13% decline in prices from 1932 to 1933 was largely accounted for by the increase in sales of (low priced) molded material. However, from 1929 to 1932 sales to standard brand buyers and equipment manufacturers had declined over a third in dollar volume and more in physical volume.7/

During the same period from 1929 to 1932 the dollar volume of private brand sales by the members almost doubled its proportion to the total sales to the replacement market. The increase in units sold was much greater because of the sharp decline in private brand prices. In the period from 1932 to 1933 the average price per foot of brake lining sold to private brand buyers declined 30% and the footage increased 50%. In clutch facings the average prices declined 70% and the number of pieces sold increased 150%. In 1933 the number of feet of brake lining sold to private brand buyers was almost half the amount sold to standard brand buyers. In the case of transmission lining it was more than half and in the case of clutch facings it was less than a sixth.7/

Private brand buyers purchased popular quick-moving items at about a third lower prices than standard brands were sold for identical merchandise.7/ Some of these buyers were large jobbers who also handled standard brands.41/ Others were mail order houses and automotive chain stores 42/ and the rest were six sales agencies who resold on a national or territorial basis. These six companies were the so-called

"affiliates" which, in 1933, were responsible for a quarter of the purchases of private brands. These affiliates purchased at lower prices and in 1933 operated on a gross mark-up of about 60%. The affiliates made the bulk of their sales in competition with the members. In 1933 less than 1% of their sales was material resold back to some of the members and 1% was resold to private brand buyers. Over 60% of their sales were to distributors, jobbers, dealers and consumers, and about a third of their sales were to chain stores and mail order houses.7/ In one case two affiliates purchased from a new member who had no established jobbing connections. In another case an affiliate with an established trade purchased from one of the smaller members who manufactured woven lining and a larger member who manufactured only molded lining. In another case, a member who had contracts with equipment manufacturers and mail order houses sold through an affiliate to the regular distributing trade. Several of the affiliates also manufactured and distributed other products to the automotive trade, such as piston rings or brake parts.33/

A standard consumer price list for brake lining, based on the cubical contents and volume of sales for each size, had been in use for years in the industry. Recently there has been added two additional lists at lower levels.43/ These lists appear to have governed all sales except lining cut to size for Fords, Chevrolets and Plymouths, and also all sales to other members, affiliates, a large part of the purchases of mail order houses and chain stores, and exporters.44/ These list prices appear to have been generally maintained to the average consumer because of the nature of the final sale and the use of flat-rate guides by the Association and the larger members. (See Part I, The Products).

Discounts to large consumers were a general practice. Discounts to large common carriers ran over 70% from list, to industrial buyers 60% and to an operator of a single bus or a half a dozen motor vehicles 45%. On small orders the discounts were lower and were given in any case both by the members and by their intermediaries.45/

With the frozen list prices the active price competition in the intermediate market brought progressively longer discounts to the intermediaries, until a discount of 80-10-10-10-10% was not unusual.46/ Of course, the two lower lists were used by the members for most of their production but the tendency persisted of using high lists to offer long discounts. The fairly inelastic demand for these products had created the sentiment in the industry that any general reduction of prices in the retail market would not materially expand the physical volume of sales.7/ However, it does appear that the high lists on standard brands restricted their sales to the advantage of private brands.47/ The practice was stated to have developed of jobbers substituting materials and reselling from a higher list than that from which materials were purchased.48/ The distribution margin of upwards of 85% of the final price provided unusual opportunities for new distribu-

tors and producers. Moreover, most of the large private brand sales were made at net prices without reference to lists. The practice of not granting lower discounts on popular items, which had a faster turnover, had the effect of providing a wider margin on these items. This accrued particularly to the advantage of private brand buyers who distributed these popular items almost exclusively.

Prior to the Code the members had tried a number of ways of adjusting their marketing to the inventory problems in the industry. Some had established a number of warehouses, other warehoused with customers, others had liberal returned goods policies and many were consigning stock or carrying ledger balances. For the most part competition between the members had the effect of returning the inventory risks to the members. Part of this development was probably due to the decline of the old wholesaler and the extension of wholesaler differentials to intermediaries who carried only limited stocks. Some of the larger companies prior to the Code had reversed their policy and liquidated even their own scattered warehouse stocks. The inventory problem did not apply on sales to other members, equipment manufacturers and private brand buyers.49/

Credits for returned merchandise increased relative to the total dollar sales each year from 1929 to 1932 and in the latter year was 130% greater than in 1929.7/

Deductions for cash discounts maintained a fairly steady percentage of the total dollar sales from 1929 to 1933.7/

It was a general practice to prepay transportion charges on larger shipments of friction materials. From 1929 to 1933 deductions from sales allowed by the members for this purpose increased sharply.7/

The relation of volume rebates to total sales in 1932 was almost double the amount allowed in 1929.

A number of practices of the nature of indirect pricing concessions had developed in this industry prior to the Code.

Total deductions from sales granted by the members for cash discounts, prepaid freight, returned goods and volume rebates almost doubled in relation to sales from 1929 to 1932. In the latter year they were over 9% of the gross sales. They declined in 1933, and in that year they ranged from 8.5% of the gross sales to standard brands down to 2.9% of the gross sales to both other members and affiliates. The deductions on sales to the two latter classes were probably only for freight and cash discounts.7/

II. EXPERIENCE UNDER THE NIRA RELATING TO DISTRIBUTIVE RELATIONS

The Asbestos Code was submitted in September 1933 50/ by the Asbestos Institute and approved November 1, 1933. The approved marketing provisions were in substantially the same form as proposed and no important protests were voiced against them.

The Code provided for:

the administration of its Divisions by Sub-Code Authorities; 5/

an open price system with a waiting period, with full discretionary powers as to its operation reserved to the Sub-Code Authorities; 52/

a prohibition of sales below cost; 53/

penalties in addition to those provided by the NIRA for any violation of the Code by Code members; 54/

authorization to the Sub-Code Authorities to develop divisional merchandising plans and codes of ethics; 55/

power in the Sub-Code Authorities to adjust complaints against the merchandising plans; 56/

inclusion of affiliates in the industry definition, affiliates to be defined in each divisional merchandising plan for the purpose of the plan; 57/

a prohibition of sales to affiliates not abiding by the pertinent provisions of the Code; and 58/

a prohibition of sales to any buyer after dates to be specified by the Sub-Code Authorities, unless the buyer had agreed in writing (1) to make no improper use of the members' merchandising plans or price schedules or otherwise misrepresent the policies or products of the member, (2) to sell from a list no higher than that from which the products were purchased, (3) and to observe all applicable provisions of the Code. 59/ The Purpose of the provision for affiliates was stated to be to prevent any manufacturer from setting up a sales company to evade the provisions of the Code. 60/

At the organization meeting of the Brake Lining Division, November 28, 1933, the officers of the Association were elected as the members of the Sub-Code Authority. 61/ The Division, after some revisions, unanimously voted to adopt, effective at once, the Merchandising Plan which had been in the process of being drafted by the Association since the summer of 1933. 62/ There is evidence that only one of the smaller companies was not in agreement with the Plan. Refusal to conform would have been difficult for this company because it was dependent on two affiliates for product outlet, and these affiliates, which were obliged to purchase part of their product from other companies,

could not jeopardize their sources by buying from a code violator. The company signed the Code the day following the adoption of the Merchandising Plan. 63/

The Merchandising Plan adopted was a detailed marketing scheme of some twenty pages and was the first of many hundred pages of regulatory measures, including price standardization practices, devised by the Division. The important provisions of the Plan for the present analysis were:

Definitions of:

Affiliates (Defined to be sellers purchasing solely from Code members, who performed part of the manufacturer's selling functions and who were approved by the Sub-Code Authority to distribute in competition with the manufacturers, provided they agreed on a written form binding them to the Code and the Plan.) 64/

Equipment materials (Friction materials sold to manufacturers of recognized standard equipment for use in the production of their own units.) 65/

Replacement materials (Friction materials sold to manufacturers of recognized standard equipment for distribution through their own distributors and dealer outlets for use on equipment of their own manufacture.) 66/

Private brands (brands of friction materials with which the member's name was not associated in any manner when the materials were resold.) 67/

Standard brands (brands other than private brands) 68/

Classification of buyers -

Industry manufacturer (other members of the Brake Lining Division) 69/

Equipment manufacturer (A builder of automobiles, industrial equipment, and automotive and industrial equipment parts) 70/

1. A buyer who purchased equipment materials for use in the production of his own units.

2. A buyer who purchased replacement materials for use in replacement through his own organization on equipment of his own manufacture.

3. A buyer who purchased friction materials for use on replacement parts of his own manufacture not used as standard equipment by automobile manufacturers.

Private brand account (A buyer of private brands) 71/

National distributor (Any member of the National Automotive Parts Association and any buyer operating places of business in twenty or more states, purchasing standard brands primarily for distribution through jobbers.) 72/

Territorial distributor (Any buyer operating as an exclusive distributor of the standard brands of a member under a contract providing for

(1) definition of the territory served by such buyer,
(2) subdistribution of such buyer's purchases primarily to jobbers, and
(3) a minimum amount of annual purchases by such buyer.) 73/

Jobber (Any buyer of either standard or private brands who carried a selected stock of merchandise, bought in wholesale quantities, warehoused a reserve stock for dealers, and resold in proper units to dealers.) 74/

Dealer (Any buyer of friction materials under standard or private brands who bought and sold automobiles and automotive parts and serviced or repaired them or any other equipment using friction materials.) 75/

(Provision was made that a member could subclassify his jobbers and dealers provided that he filed a statement of the basis used.) 76/

Consumers (Any buyer of standard or private brand materials entirely for his own consumption)

1. Operators of fleets of busses and trucks (Four subclassifications for different size fleets)

2. Very large common carriers

3. State governments

4. United States government

5. Industrial buyers unless falling within some other classification 77/

Listing of Buyers

(Required the filing of all accounts, except dealers, which would be kept confidential, except in case of dispute or upon request of a member as to the classification of a particular buyer by another member) 78/

Prices

(Required immediate filing of all prices, to be available only

to the Code members concerned and to the classes of buyers to whom they were applicable, except that the method of sub-classification of jobbers and dealers should be open to all classes) 79/

Lists and Discounts

(Required sales from lists showing the branding of the products, effective dates and the List Number prescribed by the Division. Provided for the adoption by the Division of supplements to the Plan providing numbered price lists sufficiently comprehensive to afford a wide choice in selling prices and also providing schedules of fixed trade and volume discounts.) 80/

Classes of Shipping Points

(Defined factory points, outside points and manufacturers' warehouses) 81/

Terms and Conditions

(Fixed terms of payment; prepayment of transportation charges on shipments of less than 100 pounds prohibited; 10% service charge required on cut lengths and small orders and 20% for a non-stocking jobber; and contract limitations of various sorts with differential treatment for the different classes of buyers) 82/

Returned Merchandise Policy

(Eight restrictions on returned goods, among them a 10% handling charge, a six months time limit, and a 10% limitation on the amount returned) 83/

General

Registration of Trade Marks

(Required all trade names to be registered with the Division) 84/

Marking or Branding

(Required marking with a standard or private brand all materials sold) 85/

Seconds

(Required their destruction) 86/

Obsolete Merchandise

(Required that it be so marked when sold) 87/

Cost Recovery

(Provision for the determination by an impartial agency of the lowest cost of a representative member for any type or size of material as arrived at by the Code's uniform cost formula. This determination was to be made at the request of the Sub-Code Authority and sales below the figure determined were to be a Code violation.) 88/

Standard Warranty

(Product guarantees except the standard warranty prohibited) 89/

Code of Ethics

(Required liquidation in twelve equal monthly installments of consigned stock. Also contained about forty trade practices which were declared unfair; among these were restrictions on consignments, volume rebates, cut-backs, warehousing with customers, samples, advertising allowances, and purchases and sales of other products below prevailing market prices.) 90/

Agreements

(Provided that all agreements between the members and their customers should conform to the Plan and Code.) 91/

At the organization meeting adopting the Merchandising Plan, an additional provision was adopted; this prohibited sales to any buyer who was selling in violation of the Plan. 92/ Resolutions passed at this meeting provided also that:

Industrial friction materials would not be covered by the plan. 93/

Sales to national and territorial distributors would be prohibited until they subscribed in writing to all provisions of the Plan. 94/

Members would not be responsible for any violations by their affiliates or other member customers. 95/

Names of national or territorial distributors to whom allowances were made on sales direct to jobbers would be filed and open to Code members. 96/

The effective dates of price publicity to the various classes would be staggered but none later than January 1, 1934. 97/

The Division also adopted at this time Supplement No. 1 to the Plan, covering brake lining price lists and discounts to become effective January 1. 97/ This supplement contained provision for 15 different standard price lists, with similar size differentials. Members were required by the Plan to sell from one of these lists (or compute lower ones if they wished, provided they observed the same size differentials). 98/ The supplement also provided the following:

Volume discounts could not be allowed until earned. In case of new accounts secured after April 1, pro-rata discounts could be allowed for part of the year. Members might except from the application of volume discounts any class of materials, even though such a class was included in compiling a total for the earning of volume discounts on other materials. 99/

Allowances granted to buyers not purchasing directly from the members should be considered a part of the members' discount to the buyers to whom the members originally sold the materials; thus making the original seller responsible for any improper discounts in a subsequent resale. 100/

An additional 10 discount could be granted by the small members, if approved by the Sub-Code Authority, on sales to jobbers, dealers and consumers. 101/

Schedule II of the Supplement provided a table of fixed or maximum trade and quantity discounts. Discounts to other members and equipment manufacturers purchasing for original equipment purposes were omitted from the Schedule. In the case of equipment manufacturers purchasing for replacement purposes, or for the production of replacement parts, it was provided that the discounts would be set by the Sub-Code Authority. Discounts to national and territorial distributors were to be not more than 70-5%. Preferred jobbers were to be given not more than 66-2/3% plus a range of volume discounts, the larger jobbers purchasing over $4500 annually to receive 70-5%. The unpreferred jobbers were to receive not more than 55%. Dealer discounts were fixed at not more than 55%. Discounts to consumers ranged from 70% for very large common carriers down to 40% for operators of a bus or five motor vehicles. On orders of less than $15 from dealers and all classes of consumers the discount was fixed at 33-1/3%. It was provided that no list should be used that would be low enough with the above discounts to bring the net price below the "all in sales costs." 102/

The "all in sales costs" referred to was a minimum price schedule established by the Association in August for the competitive products adapted to the low-priced popular cars--Ford, Chevrolet and Plymouth. These minima were set at three levels. The highest was to apply to sales to jobbers, with a level approximately 10% lower for sales by small members to jobbers, dealers and consumers, and a level approximately 10% lower still on sales to all private brand buyers and national and territorial distributors. 103/

All of the members of the Association and five other members of the Division had signed the Code. 104/ Full cooperation from all of the interests in the Division and in the trade appeared to have been assured until American Radiator protested, on December 15th, that the buyers' agreements provided in the Code had not been put into effect by other members for their jobbers, while it was not permitted to sell to its distributors until the distributors subscribed to the Plan. 105/ The Sub-Code Authority then established February 1st as the effective

date for the buyers' agreements, 105/but N.A.P.A., one of American Brakeblok's national distributors, refused to accept the discount established for it. The Division decided, to avoid any question of legality, that it would present the Plan to N.R.A. for formal approval. 106/ It appears to have been the belief of the Division and certain sections of the Administration that the clause in the Code making the merchandising plans "subject to review" meant that the Plan as adopted by the Division was in effect unless disapproved by the Administrator. 107/

The provisions requiring members of the Division to purchase only from Code members, prohibiting sales to national and territorial distributors not agreeing to abide by the Plan, and prohibiting sales to any buyers who were violating applicable provisions of the Code and Plan, were deleted in the Plan proposed for public hearing January 18th, 1934. The provisions in Supplement No. 1 relating to volume discounts, the members' responsibility for allowances by buyers, and the 10% extra discount for small members on sales of brake lining were incorporated into the proposed Plan. 108/

The hearing developed the objections of N.A.P.A. and American Brakeblok to the discount schedule, as well as some from other members and buyers to other sections of the Plan. 109/ However, the Sub-Code Authority, with supporting telegrams from the Deputy, continued the Plan in effect except for the discount schedule. 110/ The Deputy, in February, announced to the Division that he expected the Plan to be approved except for a short stay on the discount schedule, and it appears that the members generally entered the spring selling season observing the Plan in substantially the same form as adopted in November. 111/

A supplement to the Plan covering price lists and a discount schedule for clutch facings was drawn up about the first of January, 1934. The trade and volume discounts were established with about the same percentage differentials as for brake lining. 112/ After consideration of the supplement, it was announced early in March that all except one of the clutch facings manufacturers planned to observe it exactly, although there was no legal obligation to do so. 113/ However, after a month's operation of the discount schedule it was decided to stay the discount established for sales to equipment manufacturers who purchase for the production of replacement parts (clutch plate manufacturers). This was done because the limitation of the discount on clutch facings sold to three manufacturers put them at a competitive disadvantage on their resales of lined clutch plates to car manufacturers who were also buying direct from the clutch facing manufacturers. 114/

Provision had been made by January 1, 1934 to have the price schedules applicable to jobbers, dealers and consumers distributed to the Code members. 115/ Beginning with March 1st, the price schedules filed for distributors were distributed in the same manner. 116/ About this same time it was provided that any Code member could request from the Secretary of the Sub-Code Authority full data on the quotations made by any other code member to a private brand buyer or an

equipment manufacturer who bought for the production of replacement parts. 11f/ The practice was to advise the member whose quotations were requested the name of the member requesting and receiving his quotations. 117/ It appears that by May 1st the price publicity provisions were in full effect and compliance was good. 118/

Several plans were devised to control the sale of private brands by the members of the Division. Prior to the Code these sales had been expanding rapidly in dollar volume and even more rapidly in physical volume. 7/ These sales reduced the volume of merchandise passing through the regular standard brand replacement channels and had the effect of increasing the dependence of the members on their intermediaries. The first plan to limit price differentials to private brand buyers was drafted in December, 1933 by the Division. This plan would have given private brand buyers and equipment manufacturers, buying for use on their own replacement parts, the same trade and volume discounts as were given by Supplement No. 1 to preferred jobbers on standard brands, except for an additional 10% for purchases over $50,000 per annum. 119/ This plan was dropped when it was found that it provided a too attractive proposition to jobbers 120/because, with the same discounts on such small purchases, the fact that lower list prices prevailed for private brands would have stimulated private brand sales to the disadvantage of standard brands.

A later plan which gave the same percentage differentials on private brand purchases in quantities of ten or more times the size of purchases of standard brands, and assumed that identical private brand material would not be sold at prices lower than 20% below standard brands, appeared to be too restrictive in the other direction. 121/ A third plan levelled out the differentials between the buyers by giving the smaller chains and jobbers a better price relative to large chains and mail order houses. This plan also limited the differential to private brands to not more than approximately 20% below standard brands; but in the case of purchases of less than $200, where the expense of handling private brand materials became more than that of handling standard brand merchandise, it was provided that the best prices granted should be no lower than those given to jobbers on standard brands. 122/ The diversity of interests did not permit agreement on this plan either, and it was finally agreed, in February 1934, that, until a mutually satisfactory plan was evolved, contracts with private brand buyers at prices lower than on standard brands should be limited to shipments in one lot, and of one brand, with a net value of $200.00 or more. On smaller contracts no differential below the member's prices on standard brand materials to jobbers was permitted. 123/ It was expected at this time that the "all in sales cost" provided for sales to national and territorial distributors and private brand buyers would be an effective minimum in controlling the extent of price concessions on private brand orders of over $200.00. 103/

By the middle of the summer of 1934 large private brand buyers came strongly into the replacement market, 7/and the fact that N.R.A. had given no legal validity to the "all in sales cost" price floor created considerable competitive uncertainty among the members as to differentials to these buyers. This provoked a decision to make public

to the Code members who sold private brands the prices filed for these buyers when lower than the "all in sales cost" established for this class of customer. 124/ This "cost" was about 20% lower than the minimum "cost" established for the sale of standard brands to jobbers. The spot-lighting of these prices at first increased the prevailing differentials to private brand buyers, but within a month these differentials decreased to a margin apparently satisfactory to both the manufacturers of molded lining and the integrated manufacturers of woven lining. 125/

The decision noted above, to have February 1st the effective date for the buyers' agreements provided in the Code, was withdrawn, and three other dates set at later intervals were also withdrawn, pending formal approval of the Merchandising Plan. 126/

N.R.A. finally approved the Plan August 8, 1934, with the exceptions of: the definition of affiliates; the classification of customers; the provision for sales to be made from lists prescribed by the Division; the provisions for supplements covering mandatory price lists and trade and quantity discounts; the provision for the extra 10% discount that could be granted by the small members; the provision for the 10% service charge on cut lengths and small orders; the standard warranty; the prohibition of advertising allowances; and the cost recovery provision. 127/

The following provisions of importance to this study remained in substantially the same form in the approved Plan: the definitions of equipment and replacement materials and the definitions of private and standard brands; the requirement for a listing of buyers; the price publicity section; the restrictions on volume discounts; the provision making the members responsible for any allowances granted by their customers in reselling; the definition of shipping points; the prohibition against prepaid freight on shipments under 100 pounds; the limitations on contracts; the restrictions on returned goods; the requirements for the registration of trade names and the branding of all material; the destruction of seconds; the marking of obsolete goods; and all of the Code of Ethics except for the prohibition of advertising allowances. 128/

Additions to the original Plan, approved by NRA at this time, were: a clause submitted by the Division requiring a single discount on all types of brake lining for each class of customer and the same for clutch facings; a clause removing the mandatory character of code provisions about the terms of payment; a provision covering costs and price cutting; and a provision for the filing of advertising contracts. 129/

Following the action of N.R.A. the Sub-Code Authority gave notice to the members that "persuasion, competition and publicity" would be used to the utmost to compensate for the failure of N.R.A. to give the Division the "weapon of the law" to compel all members to abide by the rules originally devised. 130/ The Division resolved to recognize the customer classification and the definition of affiliates in substantially the same form as in the proposed Plan. 131/ N.R.A., in deleting the

mandatory customer classification in August, provided for the submission of a permissive classification. 132/ The Division spent a number of months attempting to have N.R.A. approve a classification that would be binding on all the members. After months of negotiation the Division finally acceded to the inclusion, before the classification, of a carefully prepared preamble which specifically provided that observance of the classification was entirely voluntary. N.R.A. approved the classification in April, 1935. 133/ The Division also submitted several definitions of affiliates that were intended to bring the affiliates under the Code as members of the Division. When N.R.A. failed to approve these definitions, the Division added the affiliates as a preferred class in the customer classification which was before N.R.A. for approval. The proposed definition of affiliate customers provided that contracts requiring adherence to the Plan and to applicable provisions of the Code be required of them. However, when N.R.A. in April, 1935, finally approved the permissive classification of customers, it deleted the definition of the affiliate class. 134/

There was sentiment among the members, after the failure of N.R.A. to approve the mandatory customer classification, to have a list of jobbers compiled that would be recognized and strictly followed by the members. Concern was expressed, however, that such a list would restrict the members from meeting competition from members outside the Association, and no evidence of further action in this direction is available. 135/

Asbestos prices increased considerably and held firm throughout the code period. 136/ This appears to have been in part due to the extension of Turner & Newell into the production of asbestos which had the effect of strengthening ownership controls over the raw material market. 29/ (See Part I, the Production of the Products). Furthermore, the collective controls exercised in the asbestos textile market 137/ placed the unintegrated members manufacturing woven materials at a competitive disadvantage. After the minimum prices provided by the "all in sales cost" broke in the summer of 1934, these small members complained about the narrow manufacturing margin on which they were forced to operate. 138/

By October, 193 , several members were objecting to the requirement for the disclosure to other members of their price differentials to several classes of customers. 139/ A review of the experience of the members with the price publicity regulations was made in November. The survey revealed that those in favor of publicity to distributors, jobbers, dealers and consumers, and against publicity to private brand buyers and equipment parts manufacturers, include two-thirds of the twenty largest members, all of the next ten in size, and a majority of the smallest members. The general sentiment was that while publicity, when first put into effect, created price instability, the ultimate tendency would be toward stability. 140/

III. EFFECT AND CONCLUSIONS

The evidence suggests that this industry's marketing pattern prior to the Code was marked by a continuous modification of, first, the price differentials extended to the marketing agencies and, second, the marketing services performed by these agencies. These modifications were mutually dependent on each other and were a constant expression of the innumerable forces affecting the market.

During the period of the declining effective demand that existed for this industry's products from 1929 to 1933 these modifications appear to have been accelerated. For the most part, the modifications of the price differentials extended to the marketing agencies were concessions by the members to their intermediaries to secure or maintain the flow of their products to the market. The modification of the price differential took the form of extending a larger differential than that which had previously prevailed for a group of marketing agencies performing a certain set of marketing services. Illustrations of this were provided by the extension of a longer trade discount to dealers, or the consignment of stock to jobbers, or the granting of a lower price on private brand than standard brand material purchased by jobbers, or the failure to change extra for small orders from non-stocking jobbers, on the use of a higher list price with the same discount to give a wider margin to jobbers, et cetera.

The modification of the price differential also went further and took the form of extending a prevailing differential to marketing agencies that did not perform the customary marketing functions for the particular differential. Illustrations of this were provided by the extension of a jobber's trade discount to a dealer, or a distributor's volume discounts to a jobber, or a jobber's returned goods privilege to a dealer, or a jobber's price guarantee to a dealer, et cetera.

For the most part the modifications of the services performed by the marketing agencies were concessions by the intermediaries to their customers or to the members of the Division to secure or maintain a share in the distribution of the products to the market. The modification of the marketing services took the form of the agencies either expanding or contracting, depending on market circumstances, the volume of their customary marketing services. Illustrations of this were provided by some of the large dealers reselling to other dealers and assuming jobbing services, or some group of large jobbers securing exclusive territories and assuming warehousing services, or some of the jobbers opening retail brake shops and assuming dealer services, or some large distributors advertising and promoting the sale of their private brand material and assuming the complete marketing services of some of the members of the Division, et cetera.

It appears that one of the most important forces influencing the rapid modification of marketing differentials and services since 1929 had been the entrance of new members without an established market for their products. The rapidly changing differentials and services introduced new elements of risk and uncertainty into the marketing practices of those members of the industry who had been relatively well adjusted

to the previously prevailing pattern of distribution practices and agencies and who, obviously, were predominate in numbers, size, range of products and financial power. Altogether these developments constituted a common problem to the established members and threatened to further disorder and restrict the prevailing flow of their production to the final market. The provisions of the Code and Plan, to the extent that they affected distribution, were designed to correct or control those practices which these members believed were responsible for the disruption of the "normal" channels of distribution.

There is nothing to show that these provisions for control of distributive relations were for the purpose of controlling prices per se. Rather they were conceived by their proponents to be devices or working rules primarily and immediately intended to restore the normal or regular distribution of their products. For illustration, the provisions regarding the distribution of private brands were designed in general to provide information as to the prices at which they were being bought and sold and to limit their buyers' marketing advantages in order to preserve the proponents' approach to the market through the regular replacement trade. Furthermore, the members were not concerned about price-cutting, as such, by the private brand buyers. It was only where price reductions by these distributors had the effect of reducing the volume of products passing through the regular replacement trade that control was sought by these distributors.

The code program as conceived by its proponents can be summarized as being largely formulated to arrest and correct the price differential concessions in the intermediate market. The crux of the original program was the mandatory customer classification and the maximum discount schedule. A large variety of the other provisions sought were primarily designed to make effective this central feature or else were incidentally useful in supporting it. Some of the more important of these provided resale price maintenance, the filing of the names of buyers, and the branding of products and the restrictions on consignments, returned goods, price and product guarantees, freight allowances, free goods, advertising allowances, etc. Some of these provisions had directly the effect of increasing the sales realizations of the members as, for example, the delimiting of shipping points. Other provisions, such as the sales below cost provision, although frankly and primarily designed to increase the members' sales realization had the effect of directly influencing distributive relations because of the necessity for different price floors for different classes of customers. Another important set of supplementary provisions designed to facilitate the appraisal and control of relative price levels were those relating to standard pricing practices covering standard lists, standard service charges for cut lengths, standard allowances for cutting losses on slabs, etc.

The original plan to have affiliates recognized as members of the Division would have subjected them to all the responsibilities and controls provided for the manufacturing members. The practice of sales to them on an interdepartmental basis was to be continued under the Code and Plan. The provision in the Code prohibiting sales to affiliates failing to conform to its provisions appears to have been instrumental, before NRA failed to approve the definition of affiliates, in five of

the six affiliates agreeing to abide by the Code and the Plan. In addition, there were other considerations such as restrictions on private brand sales, privileges of Code membership in regard to confidential information, their dependence on the manufacturing members, and the provision for the 10% extra discount by small members which made it advisable for them to accept the program of the Division. The evidence indicates, however, that the effect of the operation of the Plan was to bring their resale prices up to the prevailing price levels of their suppliers and other members and to reduce their share of the replacement market. 7/ 141/.

The customer classification was generally observed throughout the code period 142/ and except for the change in the definition of distributors the classification remained in substantially the same form for the automotive field as it was originally adopted by the Division in November 1933. It appears that it was only in connection with fixed price differentials that any difficulty was experienced. All of the early objections to it by the National Automotive Parts Association and several of the smaller members were with respect to the accompanying discount and contract requirements. The objections also in the fall of 1934 by the members selling to industrial buyers were due to the provision for a single discount for all types of brake lining to each class of buyer and a single discount for all types of clutch facings to each class of buyer. These objections were adjusted to a large degree by a separate classification of customers for the industrial field.

The only major objection to the operation of the discount schedule originally adopted by the Division in November 1933 was that of the National Automotive Parts Association. This Association was a group of large jobbers which had been classified as a national distributor. These jobbers had established warehouses and were performing the marketing functions of their supplier's sales department in contacting and serving the jobber and dealer trade. 143/ This association of jobbers insisted on buying at a price individually determined by their supplier and their association. It appeared that the maximum discount of 70-5% established for these buyers was not less preferred than it had been previous to the Code, but the effect of limiting their purchase price would have placed them at a disadvantage in soliciting the jobbing trade in competition with the members selling direct who were left free to spend an unlimited amount to promote sales to the same jobbers.

The operation of the extra discount of 10% allowed on sales of small members to jobbers, dealers and consumers brought the objection of one of the smaller members to NRA. This member insisted that the amount of the differential did not compensate for the differences in merchandising services provided by the large and small members. 144/

Even after the failure of NRA to approve the discount schedule it was generally followed and the deviations from it were not of particular competitive importance. The narrowing of the manufacturing margin of the smaller unintegrated members may also have restricted them from offering longer discounts. At any rate, the evidence suggests that the effect of the operation of the Plan was to reduce discounts and arrest the tendency to larger differentials.

While no complete program for handling private brand sales was finally agreed upon by the members throughout the Code period, there is evidence that the effect of the operation of the Plan was a considerable narrowing of the differentials to private brand buyers and a decline in their share of the replacement market. One large mail order house complained that the prices it paid for woven brake lining doubled. 145/ On small orders private brand material was sold at the same prices as standard brands were sold to jobbers. Except for the break in the market in July and August 1934, the prevailing prices on the larger orders of private brand materials were about 20% lower than standard brands.

Another important part of the original program of the members was to have resale prices strictly maintained in connection with the discount schedule. A number of provisions which directly provided for or indirectly supplemented the control of resale prices were provided in the Code and Plan. No specific requirements were put into effect, however, except for the uniform discount schedule with its resale feature, which was being put into effect prior to the public hearing on the Plan, January 18, 1934.

Early in January 1934 several of the smaller members protested that the effect of the operation of the resale features of the uniform discount schedule was to restrict their sales, to the advantage of the large members with brands well known to the trade. It was maintained that a differential of 10% was not sufficient to compensate for the difference in their merchandising services and selling costs and those of the larger members. Furthermore, evidence was submitted that since the discounts were limited the large members were expanding their merchandising services by making available to their jobbers test cars, factory salesmen, and other merchandising aids. One of the small members carried its complaint through to the National Recovery Review Board. This agency held a hearing on the matter in April, 1934, and declined to pass on the merits of the Merchandising Plan; however, it informed the complainant that he would not be required to observe the discount schedule since the schedule had not been formally approved by N.R.A. 146/

In regard to the provision for the buyers' agreements provided by the Code, it should be noted that the Division was hesitant to put them into effect after the approval of the Plan by N.R.A. In the first place, the sharp increase in the volume of sales to the replacement market through the equipment manufacturers' channel brought objection from some of the members to putting the agreements into effect unless it was certain that the automobile manufacturers would also be governed by such agreements - which was highly unlikely. Furthermore, the members selling direct to jobbers feared that the members selling to jobbers through distributors would be required to sign up their distributors. Then those distributors in reselling to jobbers would not be required to sign up their jobbers and those jobbers would be able to take advantage of the jobbers who were sold direct and committed to strict adherence of resale prices. The same situation also prevailed, to a much smaller extent, in the case of members selling direct to dealers. In the latter part of the code period the members were considering the possibility of putting the agreements into effect with equipment manufacturers and distributors. 48/

In September 1934 it was the opinion of some of the members that the putting into effect of the wholesale automotive codes would mean the publishing of resale prices by the automotive parts jobbers and the strict adherence by them to the suggested resale discounts of the members. 147/

For the most part suggested resale prices were generally followed throughout the code period and their observance was greater than prior to Plan.

A survey of the members' opinions of the results of the operation of the Code and the Plan and their wishes as to the future, conducted by the Sub-Code Authority in April, 1935, revealed the following information as to views of the first 16 members replying: 148/

One-third opposed a mandatory customer classification.

One-third opposed any price publicity, another third favored it for all the members concerned who filed and the rest favored a plan of having each member naming the other members to whom his prices would be available.

One-third opposed the continuance of the single discount,

One-fourth opposed the continuance of the quantity discount restrictions.

Two of the members opposed the requirement of trade mark registration and the branding of materials.

Three opposed the continuance of the restrictions on contracts and returned goods.

Two opposed the provisions for the destruction of seconds and the limitation on advertising allowances.

All except one favored the continuance of the many prohibitions against indirect price concessions.

Two-thirds replied that their profits were no greater or the deficits were no less in 1934 than in 1933. They also replied that they believed that their profits would have been greater without the Code or Plan.

One-third favored continuing the Plan substantially as written, another third favored it with modifications and four of the members opposed its continuance.

With one exception it was believed that any code or plan continued after June 16th should be obligatory on all the members of the Division.

The latest record of the sentiment of the members, in June 1935, indicated that at least thirty of the members, representing well over 90% of the volume of business, had agreed to cooperate and continue to follow the Merchandising Plan. 149/

Total dollar sales of friction materials gained 16% in 1934 over 1933. Sales to the replacement market alone increased 12%. There were substantial shifts in the volume passing through the various agencies serving this market. Purchases of affiliates declined 13% and their share of this market dropped from 4% to 3%. Purchases of private brand buyers declined 17% and their share of this market dropped from 10% to 8%. Purchases of standard brands (distributors, jobbers, dealers and consumers or the regular "replacement trade") increased 3% and their share of this market declined from 71% to 65%. Purchases of equipment manufacturers increased about 82% and their share of this market increased from about 15% to about 24%. 7/

Sales of small members who did not classify their sales increased 12% from 1933 to 1934. Inter-member sales declined 30%. Purchases of equipment manufacturers for the production of their own units increased about 43%. Sales for export increased 13%. 7/

The extent to which the operation of the Plan was responsible for the sharp increase in the share of the replacement market in 1934 secured by automobile manufacturers and their resale outlets can not be definitely established. It is reasonable to believe, however, that since the Plan did not cover this channel of distribution, the operation of the Plan was indirectly responsible, to a large extent, for the expansion of the sales through this channel.

This chapter was written by Clayton Gehman.

The footnotes to this chapter appear in the back.

Note: Unless otherwise noted, the footnote references in this Chapter to "Secretary", "Sub-Code Authority", "members", "Plan", and "Division" refer to the Brake Lining and Related Friction Products Division of the Asbestos Industry. Also all Division "Bulletins", "Memoranda", "Questionnaires," "Confidential Information Bulletins", "Sales Statistics Bulletins", and "Minutes" of Division, Sub-Code Authority and Committee meetings are referred to as being in the Deputy's special ringbinders. There were three ringbinders containing as follows:

Brake Lining Division
Index
Memoranda
Bulletins
Lists

Brake Lining Division
Minutes of Meetings

Brake Lining Division
Confidential Information
Statistics
Miscellaneous
Questionnaires
Codes

1/ Code of Fair Competition for the Asbestos Industry; Article II, Section 5 and Schedule I.

2/ Minutes of a meeting of the Code Authority for the Asbestos Industry, June 21, 1934; Deputy's files, Code Authority Minutes folder.

3/ Code, op. cit., Article II, Section 6.

4/ Transcript of Public Hearing on the Proposed Code for the Asbestos Industry, October 19, 1933, pp. 46-47.

5/ Proposed Merchandising Plan for the Division as revised for Public Hearing, January 18, 1934, Section I, B.

6/ Asbestos, Volume XVI, No. 12, page 39.

7/ Sales Statistics Bulletins issued by the Secretary of the Brake Lining Division to the members of the Division and the NRA; Deputy's special ringbinders. (These Sales Statistics Bulletins were prepared by the Division Office from sales statistics reported by practically all of the members of the Division at monthly intervals.)

8/ Brief from the Sub-Code Authority to the Deputy, April 3, 1934; Deputy's files, folder No. 30a.
Proposed Merchandising Plan, Supplement No. 2, Schedule I; Deputy's special ringbinders.

9/ Asbestos, Volume X, No. 9, page 30.

10/ Transcript of Public Hearing on the Merchandising Plan, January 18, 1934, pages 38-43.

11/ Asbestos, Volume XVI, No. 2, pages 18 and 19.

12/ Asbestos, Volume X, No. 2, pages 44 and 45.
Proposed Merchandising Plan, Supplement No. 2, Schedule II, Note 2; Deputy's special ringbinders.
Questionnaire No. B-5, March 31, 1934; Deputy's special ringbinders.

13/ Transcript on Plan, op. cit., pages 48-54.

14/ Bureau of the Census, Number of Establishments, Salaries, Wages, cost of Materials, Cost of Fuel and Energy, and Value of Products for Establishments Reporting Only Brake Lining and Clutch Facings, 1929, 1931, and 1933. This table was prepared from a special compilation made by the Bureau for the use of the Distributive Relations Unit. A copy is contained in the Unit's files.

15/ Mineral Resources, 1931, Part II, page 207.
Minerals Yearbook, 1932-33, Part III, pages 747 and 750.

16/ Minerals Yearbook, 1932-33, Part III, page 746.

17/ Mineral Resources, 1930, Part II, page 267-8.

18/ Mineral Resources, 1929, Part II, page 203.
Minerals Yearbook, 1932-33, Part III, page 750.

19/ Division Bulletin No. B-66; Deputy's special ringbinders.

20/ Asbestos, Volume XIV, No. 10, page 16,
See also below.

21/ Standard Statistics Co., Inc., Standard Corporation Records, July 19, 1935, page 2845; July 26, 1935, page 2955; April 20, 1934, page 589; and July 18, 1935, page 3259.
Division Bulletin No. B-66; see 19/.
Moody's Industrial Securities, 1932.
Thomas' Register of American Manufacturers. 1934 edition.

22/ Asbestos, Volume XV, No. 7

23/ Division Bulletins Nos. B-26 and B-66; Deputy's special ringbinders.
Minutes of Division meeting. September 17, 1934, page 7; Deputy's special ringbinder.

24/ Asbestos, Volume X, No. 7, page 16, No. 9, page 30, and Volume XV, No. 3, page 20.
B.L.M.A's Automotive Data Books, 1932 edition.

25/ Minutes of Asbestos Textile Division Meeting, November, 10, 1933; Deputy's files, folder No. 36.

Minutes of Division Meeting, April 3, 1935; Deputy's special ringbinders.
Thomas, op, cit.
Asbestos, Volume XVI, No. 5, page 1; Volume XIV, No. 7, page 7; Volume XIV, No. 7, page 9, Volume XVI, No. 12, page 33.
Motor, Volume LXIV, No. 5, pages 17-24, 43.
Moody's, op. cit.

26/ Asbestos, Volume X, No. 4, page 54, and No. 7, page 10.
Mineral Resources, 1928, Part II, page 100.
Samuel H. Dolbear, Statement of Facts Affecting the Canadian Asbestos Industry, pages 1 and 4 in his Data on the Asbestos Industry.

27/ Dolbear, Notes, page 4, op. cit. and Statement of Facts Affecting the Canadian Asbestos Industry, pages 1 et. seq.
Asbestos, Volume X, No. 7, page 10 and No. 1, page 9;

28/ Dolbear, Notes, pages 4 and 5, op, cit.
Asbestos, Volume XV, No. 11, pages 8-10.

29/ Mineral Resources, 1929, Part II, page 200.
Minerals Yearbook, 1932-33, Part III, page 750; 1934, Part III, page 1011.
Asbestos, Volume V, No.7
Asbestos, Volume XV, No. 8, page 18
Asbestos, Volume XVI, No. 1, page 1.

30/ Mineral Resources, 1928, Part II, pages 99 and 101 and 1930, Part II, page 267.
Asbestos, Volume X, No. 6, page 34; No. 7, page 10; No. 8, pages 2 and 3; No. 9, page 34; and No. 11, pages 30 and 31.

31/ Minerals Yearbook, 1932-33, Part III, pages 750 and 747.
Mineral Resources, 1929, Part II, page 202 and 1931 Part II, page 210.

32/ Transcript on Plan, op. cit., pages 186-9.
Standard Statistics, op. cit., September 18, 1935, page 3061.

33/ Letter from the Secretary of the Division to the Deputy, September 22, 1934, Deputy's files, folder No. 30a.

34/ Transcript on Plan, op, cit., pages 38-43.

35/ Ibid., pages 127-134. See also 36/ and 40/.

36/ Minutes of Division meeting, January 29, 1934, pages 4-6; Deputy's special ringbinders.

37/ Standard Statistics Inc., op. cit., July 29, 1935, pages 4424-5.

38/ Ibid., March 22, 1935, page 3927.

39/ Transcript on Plan, op, cit., pages 186-9,
Brief from the Sub-Code Authority of the Division to the Deputy, February 1, 1934; Deputy's files, folder No. 30a.

40/ Letter from Southern Friction Fabric Products Co. to the Deputy, August 14, 1933; Code Record, Volume A. page 2-1.

41/ Report of the Division's Private Brand Committee to the Sub-Code Authority, February, 3, 1934; Deputy's special ringbinder.

42/ Transcript on Plan, op. cit., pages 38-43.
See also 7/.

43/ Brief from the Sub-Code Authority to the Deputy, April 3, 1934; Deputy's files, folder No. 30a.

44/ Proposed Plan, op, cit., Section V, C.
Attachments to the letter from the Secretary of the Division to the Deputy, August 10, 1934; Deputy's files, folder No. 30a.
Divisions' Confidential Information Bulletins No. 1, September 22, 1934, to No. 53, May 27, 1935; Deputy's special ringbinder.

45/ Proposed Plan, op. cit., Section II, H and its Supplement No. 1, Schedule II; Deputy's special ringbinder.

46/ Brief from the Division to the Deputy, February 2, 1934; Deputy's files, folder No. 30a.

47/ Division Memorandum No. B-6, March 29, 1934; Deputy's special ringbinder.

48/ Memorandum from the Secretary of the Division to the Deputy, November 5, 1934; Deputy's files, reports folder.

49/ Transcript on Plan, op. cit., pages 103-4.
Minutes of Division Meeting, September 17, 1934, page 3; Deputy's special ringbinder.

50/ Code Record, Volume A.

51/ Code, Article VI, Section 1 (f).

52/ Code, Article VIII, Sections 1-4.

53/ Code, Article IX.

54/ Code, Article VI, Section 2 (e).

55/ Code, Article VI, Section 4.

56/ Code, Article VI, Section 3.

57/ Code, Article II, Section 5 and Article XI, Section 1.

58/ Code, Article XI, Section 1.

59/ Code, Article VIII, Section 5.

60/ Letter from the Asbestos Institute to the Deputy, on October 3, 1933; Code Record, Volume A, page 61.

61/ Asbestos, Volume XV, No. 3, page 20.

Minutes of Division Meeting, November 28, 1933, pages 4-5. Deputy's special ringbinders.

62/ Transcript on Plan, op, cit., page 45.
See also 61/.
Minutes of Division meeting November 28, 1933, pages 6-16;

Deputy's special ringbinders.

63/ Letter from Southern Friction Fabric Products Co. to the Deputy, August 14, 1933; Code Record, Volume A. page 201.
See also 44/, attachments to the August 10th letter.
See also 43/.
Minutes of Division meeting, November 29, 1933, page 20; Deputy's special ringbinders.

64/ Proposed Plan, Article I, E.

65/ Proposed Plan, Article I, I.

66/ Proposed Plan, Article I, J.

67/ Proposed Plan, Article I,K.

68/ Proposed Plan, Article I, L.

69/ Proposed Plan, Article II, A.

70/ Proposed Plan, Article II, B.

71/ Proposed Plan, Article II, C.

72/ Proposed Plan, Article II, D.

73/ Proposed Plan, Article II, E.

74/ Proposed Plan, Article II,F.

75/ Proposed Plan, Article II, G.
76/ Proposed Plan, Article II, last paragraphs of F and G.

77/ Proposed Plan, Article II, H.

78/ Proposed Plan, Article III.

79/ Proposed Plan, Article IV.

80/ Proposed Plan, Article V.

81/ Proposed Plan, Article VI.

82/ Proposed Plan, Article VII.

83/ Proposed Plan, Article VIII.

84/ Proposed Plan, Article IX, A.

85/ Proposed Plan, Article IX, B.

86/ Proposed Plan, Article IX, C.

87/ Proposed Plan, Article IX, D.

88/ Proposed Plan, Article IX, E.

89/ Proposed Plan, Article X.

90/ Proposed Plan, Article XI.

91/ Proposed Plan, Article XII.

92/ Minutes of Division Meeting, November 28, 1933 page 15; Deputy's special ringbinder.

93/ Ibid., page 5.

94/ Ibid, pages 8 and 9.

95/ Ibid, page 6.

96/ Ibid, page 15.

97/ Minutes of Division Meeting, November 29, 1933, page 25; Deputy's special ringbinders.

98/ Supplement No. 1 to the Plan, Sections IV, V, And VI; Deputy's special ringbinders.

99/ Ibid, Section VII.

100/ Ibid, Section VIII, second paragraph.

101/ Ibid, Section VIII, third paragraph.

102/ Ibid, Schedule II.

103/ Divisions confidential Bulletin, No; 3, December 6, 1933; Deputy's special ringbinders.

104/ Division Bulletin No. 9-10, December 21, 1933; Deputy's special ringbinders.

105/ Minutes of Sub-Code Authority meeting, December 19, 1933, Pages 5 and 6; Deputy's special ringbinders.

106/ Ibid, December 23, 1933, pages 1 and 2; Deputy's special ringbinders.

107/ Letter from the Chairman of the Sub-Code Authority to the members of the Division, December 30, 1933; Code Record. Code Authority Bulletins, etc.

108/ Proposed Plan and its Supplement No. 1; Deputy's special ringbinders.

See also Memorandum No. B-2 from the Secretary of the Division to the members, January 5, 1934; Code Record, Code Authority Bulletins, etc.

109/ Transcript of Public Hearing on the Proposed Plan, January 18, 1934.

110/ Minutes of Division meeting, January 29, 1934, page 3; Deputy's special ringbinders.

111/ Ibid, February 19, 1934, pages 4-6; Deputy's special ringbinders.

112/ Minutes of the meeting of the Clutch Facing Committee of the Division, December 19, 1933; Deputy's special ringbinders.
Minutes of the Division Meeting, January 29, 1934, page 23; Deputy's special ringbinders.

113/ Division Bulletin No. B-17, March 5, 1934; Deputy's special ringbinders.

114/ Minutes of the meeting of the Clutch Facing Committee of the Division, April 11, 1934; Deputy's special ringbinders.

115/ Minutes of Sub-Code Authority meeting, December 5, 1934; page 7; Deputy's special ringbinders.

116/ Ibid, March 2, 1934, page 8.

117/ Ibid, September 17, 1934, page 1; Deputy's special ringbinders.

118/ Division Bulletin No. B.-29, April 14, 1934 and No. B-38, May 24, 1934; Deputy's special ringbinders.

119/ Divisions Confidential Bulletin No. 7, December 12, 1933; Deputy's special ringbinders.

120/ Ibid, No. 7A, December 13, 1933; Deputy's special ringbinders.

121/ Ibid.
Minutes of Sub-Code Authority meeting, December 19, 1933, pages 2-3; Deputy's special ringbinders.
Division Questionnaire No. B-1, December 26, 1933; Deputy's ringbinders.
Divisions Confidential Memorandum No. B-1, January 2, 1934; Deputy's special ringbinders.

122/ Memorandum from the Division's Private Brand Committee to the Sub- Code Authority, February 3, 1934; Deputy's special ringbinders.

123/ Minutes of Division meeting, February 19, 1934, pages 8-9;

Deputy's special ringbinders.

124/ Minutes of Sub-Code Authority meeting June 4, 1934; Deputy's special ringbinders.

125/ Division Bulletins Nos. B-45, July 24; B-45a, July 2; B-45b, August 4, etc.; Deputy's special ringbinders.

Minutes of Division Meeting, August 14, 1934, pages 10-13; Deputy's special ringbinders.

126/ Division Bulletin No. B-23, March 20, 1934; Deputy's ringbinders.

Minutes of Sub-Code Authority meeting, April 24, 1934, page 5; Deputy's special ringbinders.
Division Bulletin No. B-31, April 30, 1934; Deputy's special ringbinders.
Minutes of Sub-Code Authority meeting, June 4, 1934, page 5; Deputy's special ringbinders.
Division Bulletin No. B-39; June 7, 1934; Deputy's special ringbinders.
Memorandum from the Secretary of the Division to the Deputy, November 5, 1934; Deputy's files, Reports folder.

127/ See the approved Plan and compare with the following parts of the proposed Plan: Section I, E; Section II, Section V, A, 1; Section V. B; Section V, E, third paragraph; Section VII, C; Section X; Section XI, C, 8, d; and Section IX, E.

128/ See the proposed Plan and compare with the following parts of the approved Plan: Article I, Sections H, I, J, and K; Article III; Article IV; Article V, Section C; Article V, Section D, second paragraph; Article VI; Article VII, Section B, Article VII, C; Article VIII, Article IX, Sections A and B; Article IX, Section C; Article IX, Section D; Article X.

129/ Approved Plan, Article V, Section D. first paragraph; Article VII Section A, (d); Article IX, Section E; Article X, Section C, 7, d,e, and f.

130/ "Statement of the Sub-Code Authority on the Merchandising Plan", page 2; Deputy's special ringbinders.

131/ Minutes of the Division meeting August 14, 1934; pages 8; Deputy's special ringbinders.

132/ Approved Plan, Article II.

133/ See the exchange of correspondence, reports, etc., beginning in November, 1934; Deputy's file, folder No. 29
Administrative Order No. 80-28, issued April 29, 1935.

134/ Letter from the Secretary of the Division to the Deputy, September 22, 1934; Deputy's files, folder No.30a.
Minutes of Sub-Code Authority meeting, October 23, 1934, pages 2-3; Deputy's special ringbinders.
Letter from the Secretary of the Division to the Deputy, November 7, 1934; Deputy's file, folder No. 29.
"Customer Classification", dated November 5, 1934; page 1; Deputy's files, folder No. 29.
Note in the approved classification of customers the omission of Class 2 in A. Classification of Buyers in the Automotive Field.

135/ Minutes of Division meeting, September 17, 1934, pages 7-8; Deputy's special ringbinders.

136/ Asbestos, Volume XV, No. 1, page 23; No. 5, page 15; No. 6, page 15; No. 7, page 14; and No. 9, page 16.

137/ Bulletin of the Textile Division, January 17, 1934; Deputy's files, folder No. 6.
Ibid, April 25, 1934.
Ibid, July 1[illegible], 1934.
Minutes of the Textile Division Meeting, September 18, 1934; Deputy's files, folder No. 6.

138/ Letter from the Standard Brake Lining Co. to the Administrator, June 6, 1934; Consumers' Advisory Board files, Compliance folder.
Letter from the Secretary of the Asbestos Code Authority to the Deputy, August 9, 1934; Deputy's files, folder No. 30a.
Minutes of the Division meeting, August 1[illegible], 1934, pages 10-13; Deputy's special ringbinders.

139/ Minutes of Sub-Code Authority meeting October 23, 1934, page 2; Deputy's special rin binders.

140/ Division Questionnaire No. B-11, October 13,1934; Deputy's special ringbinders.
Report on the replies to the questionnaire compiled December 12, 1934. Copy of the report attached to a copy of the Minutes of Sub-Code Authority meeting, January 10, 1935; Deputy's special ringbinders.

141/ Minutes of the Division meeting, February 19, 1934, page 8; Deputy's special ringbinders.

Minutes of the Sub-Code Authority meeting March 2, 1934, page 6; Deputy's special ringbinders.

142/ Letter from the Secretary of the Division to the Deputy, January 1[illegible], 1935; Deputy's files, folder No. 29.

143/ Transcript on Plan, op, cit., pages 99-103.

144/ Letters from Hoosier Friction Products Co. to the Secretary of the Division, January 6, January 25 and February 28, and March 1, 1934; Deputy's files, National Recovery Review Board Folder.

145/ Letter from Montgomery Ward and Co.; contents noted in a report contained in the Research and Planning Division files.

146/ See the Deputy's files, National Recovery Review Board folder.

147/ Minutes of the Division meeting, September 17, 1934, page 9; Deputy's special ringbinders.

148/ Division Questionnaire B-15, April 2, 1935; Deputy's special ringbinders.

Division Bulletin No. B-89, April 22, 1935; Deputy's special ringbinders.

149/ Division Memorandum No. B-37, June 5, 1935; Deputy's special ringbinders.

Chapter V

Plumbing Fixtures Industry

I. THE INDUSTRY

A. The Product

1. The function and technical development of the product.

In a publication of the U. S. Department of Commerce entitled "Recommended Minimum Requirements for Plumbing", (*) plumbing fixtures are called "receptacles intended to receive and discharge water, liquid, or water-carried wastes into a drainage system with which they are connected." The plumbing system, of which the fixtures are a part is defined as follows:

> "The plumbing system of a building includes the water and distributing pipes; the fixtures and fixture traps; the soil, waste and vent pipes; the house drain and house sewer; the the storage water drainage; with their devices, appurtenances and connections all within or adjacent to the building."

The sponsors of the Plumbing Fixture Code included manufacturers of the following products: (**)

> "(a) Enameled cast iron plumbing fixtures, such as bathtubs, shower receptors, lavatories, sinks, drinking fountains, laundry trays, closet tanks, accessories, and the like.
>
> "(b) Vitreous China plumbing fixtures, such as lavatories, drinking fountains, closet bowls, closet tanks, urinals, bath tubs, accessories and the like;
>
> "(c) Seats of whatever composition, for installation on and for use in connection with closet bowls and the like;
>
> "(d) Sanitary brass plumbing fittings, such as bath fittings, shower fittings, lavatory fittings, sink fittings, drinking fountain fittings, and other completed fittings and trimmings for use in connection with plumbing fixtures and the like;
>
> "(e) Such branches and subdivisions thereof and such related industries as may from time to time, with the approval of the Administrator, be included under the provisions of this Code."

The National Recovery Administration files do not offer much information about either the technical development or the growth of the industry (if indeed it might be called one industry). The one exception to a complete absence of such material consists in the description supplied by Former Governor Kohler, President of the Kohler Company, in presenting the proposed plumbing fixtures code at the public hearing of August 30, 1933, and this is reproduced here in part: (***)

(*) U. S. Government Printing Office 1932.
(**) Article II, Section 1.
(***) Code History, Special Exhibit Vol. I.

"There were comparatively few bath fixtures manufactured before 1890 and the growth of the indoor bathing really began in the following decade. The growth of the industry was predicated in large measures upon the installation of water supply and sewage systems in an increasing number of communities and to the advertisements and exhibits of beautiful and practial fixtures in showrooms maintained by the larger manufacturers.

"There are several processes utilized in the making of the various kinds of enameled ware, but in this industry it is confined to the utilization of the so-called dry process; powder-like enamel applied on cast iron.

"The enamel, which might be termed an opaque glass, is a composition of silica, spar, fluxes and opacifying material which is carefully weighed, mixed and melted. After it is withdrawn from the metal furnace it is pulverized in dry form to certain standards of fineness ready for use. The cast iron article to be enameled is cleaned of its sand and other foreign substances by sandblast and other means, carefully finished, covered with a ground or slush coat, placed in a furnace and heated to a temperature of 1600 to 1800 degrees Fahrenheit for a few minutes. It is then withdrawn and the enamel, the preparation of which has been briefly described, is sifted thereon in powder form.

"The fusibility of the enamel powder causes it to adhere to the hot ground coated iron casting and after several continuous coatings as the casting revolves on its turning cradle it is returned to the furnace where it remains again for several minutes. It is then withdrawn and a similar coating is applied. While some articles can be made with one coat, many require two or more, depending upon the nature of the article, the character of the enamel, and the purpose for which it is to be used.

"The real growth of the sanitary cast iron enamel fixture industry occurred in the last twenty years, although it was interrupted during the war, when its products were classified as non-essential. Following the war there was an acceleration of residential building to meet the dammed-up demand resulting from the war period inactivity, and the sales of bath tubs exceeded 100,000 pieces a month, with corresponding sales of lavatories, sinks and other fixtures. Since 1928, however, the output has declined to an extraordinary extent.

"While all enameled plumbing fixtures formerly sold were white -- and the majority of them sold today still are -- color was introduced a few years ago, complicating the problem of the manufacturer and the distributor, for it meant the handling or carrying of eight to ten different colored stocks where originally one sufficed.

"Through the introduction of mechanized operations and improved methods and processes, such as lighter and better castings, efficient furnaces, more effective control, and the use of an acid-resisting enamel, very fine, superior fixtures are produced and sold at relatively low prices today.

"The Sanitary Cast Iron Enamel Ware Association is an old one; except for a few short lapses, there has been an organization of this character since practically the early nineties.

"For nearly twenty years there has been no sale of so-called "seconds" or culls by enameled ware manufacturers. Because of this there has been a stabilization of quality and an assured protection to the ultimate consumer that blemished goods cannot be substituted by unscrupulous individuals for perfect goods ordered and paid for. The elimination of "seconds" naturally required strict standards of manufacture, but the "no-seconds" practice in effect for twenty years has actually redounded to the benefit of the consuming public, the workmen whose earnings increased as they became more skilled and careful, as well as to the industry.

"Vitreous China Plumbing Fixtures"

"The present Vitreous China Plumbing Fixture Association participating in this code is of comparatively recently origin, but is fully representative of the industry.

"The making of clay products is one of the earliest arts, dating back to the day when primitive man baked his vessels of clay in the open fire. Vitreous china plumbing fixtures are among the finest clay products made, and compare in composition, beauty of appearance, and serviceability with the fine china ware so highly treasured.

"The composition consists of ball and china clays, spars, and flints thoroughly cleaned, treated and mixed with water, for it is used in liquid form in the casting of fixtures.

"The ware is fired for several days at temperatures reaching a peak of 2500 degrees Fahrenheit.

"While some fixtures in this country are made by the single fired process, namely, the body, or bisque, and the glass being fired simultaneously, the majority of fixtures manufactured today are fired twice; once in the clay body or bisque, and secondly, after being cooled and covered with a liquid glass coating.

"This is a simple description of a process which, if related in all of its ramifications and details, would take considerable time.

"The resulting vitreous china plumbing fixtures are the finest clay products that can be made for the purpose for which they are used.

"The line includes lavatories which, because of their quality, are becoming increasingly popular; toilets, for which a clay composition is the practical material to use; drinking fountains; urinals, and other fixtures.

"Vitreous china bath tubs, because of their size, have not so far been successfully made commercially.

"The vitreous china industry, like the sanitary cast iron enamel fixture industry, requires constant vigilance and attention to succeed.

"For centuries the method of manufacturing and firing pottery was essentially the same, for very few changes were made in the processes.

The forming of the article was by hand and it was fired in circular or Beehive kilns, a type still in practical use in this country and abroad.

"In the beginning of the last decade marked advances were made in the processes through the substitution of casting for hand moulding, and the firing by some manufacturers in continuous kilns as long as 400 feet. In these, the green articles, previously dried, enter cold on moving trucks at one end, and pass slowly through the kilns at an increasing temperature up to 2500 degrees Fahrenheit. They then continue to the exit doors through constantly decreasing temperatures, so that when they come from the furnace they can be safely handled.

"Great care is required in the manufacture if perfect goods and a low percentage of defective ware are to be expected. These results can be accomplished with careful workmanship, proper supervision and the exercise of constant vigilance.

"As a protection to the public and to stabilize market conditions, the Vitreous China Plumbing Fixture Association, in the formulation of this code, has declared itself opposed to the sale of second grade or cull fixtures in this country.

"Colors comparable with those supplied in enameled cast iron fixtures are available in vitreous china, although their production is far more difficult than the former because of the extremely high temperatures at which china ware is fired.

"The matching of enameled ware and vitreous china colors introduces complications because of the difference in composition, the firing temperatures and time required in their respective manufacture.

"Plated Brass Plumbing Fittings"

"The Sanitary Brass Manufacturers Association and the National Brass Association include the leading brass manufacturers in this country.

"The product of these manufacturers involves an ancient art, preceded in metal working only by that of copper. The fixtures are made in great variety and sold at low prices, for there are many manufacturers and the competition has been extremely keen.

"The greatest improvement in quality in recent years has been the substitution for nickel-plating of chromium plating, which gives a somewhat silver-blue coating. It has an extremely longer life than nickel plating.

"As in the enamel and the vitreous china industries, new and improved designs are constantly appearing, which in combination with the fixtures of these other industries, present truly beautiful and hygienic combinations.

"Seconds' or culls are not recognized in the marketing of sanitary brass fittings, but there are many grades of quality.

"Seats"

"Sanitary seats are made in all the variety of colors available in vitreous china. Superior articles are to be had at low prices.

"A difficulty in stabilizing this industry is that the body of the product is made of different materials: wood, hard rubber, and various compositions.

"It is not a large industry, but its product is supplemental and necessary to the china fixture industry. Some 'seconds' have been sold in the past, but in adopting the code the industry went on record opposing their future sale.

"Most of the seat manufacturers in this country are members of the Seat Manufacturers Association."

2. Product relationships as evidenced through NRA codes.

Governor Kohler named five groups which sponsored the code and which were considered to be "the industry", although article II, Section 1 (e) of the Code provided for the admission of further groups as opportunity arose. The naming of these five groups as the plumbing fixtures industry is very likely to be misleading, however, both because of differences in composition and because of differences in function of the four kinds of products made by the groups. Vitreous china ware and cast iron enameled ware are fixtures, but seats and plated brass goods are fittings. Furthermore, all four kinds of products are distinct in composition. Cast iron, clay, brass and wood are the respective principal raw materials, each one of which is processed to greater or less extent.

Equally important with the distinctions between the four kinds of products listed above is the fact that several industry groups were omitted from the approved Plumbing Fixtures Code although five or six other groups expressed the desire to become members, prior to the code's approval. One of these groups, ferrous metal range boiler manufacturers, was included later by amendment to the code. But the whole subject is associated so closely with that of the entire plumbing system, particularly as concerns distribution of the products, that it seems desirable to return to the concept developed in the Department of Commerce publication, with a few words about the products and their relationships.

The pipes for distributing water may be of lead, wrought iron, steel, brass, copper, or copper alloy steel with brass or galvanized cast iron or galvanized malleable iron fittings. In the early use of piped sinks and baths, which were followed closely by the inside water closet, piping was generally run in lead. Lead pipes have been gradually dispensed with in favor of the other materials, and at the present time, an entire installation may be effected without the use of lead except for caulking joints.(*) The fixtures and accessories, second stage in the plumbing system, may be of enameled cast iron, porcelain, vitreous china, cement, plated brass, steel, wood, or rubber. The waste and vent pipes are generally caulked cast iron soil or steel or wrought iron screwed pipe.

(*) Preliminary Report on the Construction Industry - N.R.A. Division of Review, Dec. 17, 1935; Vol. II, p. 22, and "Recommended Minimum Requirements for Plumbing", op. cit. pp. 28-35

With a few ommissions the products named constitute the whole of what is narrowly meant by the plumbing system. A full comprehension of this fact is important for two reasons, first that the final step in distribution, i. e., through the plumbing contractor (as it has been in the past) is the same for all of the above-named products. All parts of the household plumbing supply are usually installed by the plumbing contractor or master plumber and are frequently sold to the final consumer by the same individual. The second reason for the importance of this picture consists in the code relationship and the lines of jurisdiction over the products developed during the NRA period.

It may be worth noting that each one of the products would furnish material for an interesting study in distributive relations. At this point in the background, however, it is principally necessary to indicate in what industries the products were manufactured and what associations claimed authority. Pipe for plumbing is produced in the following industries:

Iron and Steel
Copper and Brass Mill Products
Lead
Cast Iron Soil Pipe

The pipe of the above mentioned industries is competitive to a greater or lesser extent, but there is little trouble about determining what pipe is produced in what industry. The raw material and processes of manufacture are fairly exclusive.

The other products entering into a plumbing system, such as fittings, valves, traps, elbows, special pipes, etc., many of which are specialties, are made not only in the above industries (for which there are well established associations), but also by manufacturers who group themselves in part as follows:

Valve and fittings manufacturers
Tubular plumbing goods manufacturers
Sanitary brass manufacturers
Brass products manufacturers
Flush valve manufacturers
Tank trim manufacturers
Plumbers cast iron specialty manufacturers

The U. S. Department of Commerce has become well aware in the past ten years of the difficulties of dealing with organizational pride in the above named groups. It has been impossible to segregate the products thought reasonably to be included in each industry, even for the purpose of making statistical reports. Troubles under the NRA were still greater, due frequently to the different methods employed in the first step of distribution.

In an attempt to define plumbing fixtures by naming them, it is important to include not only those products included in the code, but some others as well, although with many of the latter there is considerable question as to whether they are not really parts of the pipe industries. But some of these hold a borderline status by virtue of the fact that the Plumbing Fixture Code put them there. Thus, one of the oldest products manufactured in the fixtures industry is staple porcelain or all clay ware,

which is still produced in some quantities, but has been displaced to a large extent by cast iron enamel and vitreous china ware. There are four manufacturers, however, who produce some porcelain fixtures, principally laundry trays and bath tubs. Three of the four make other products which came under the code; but since porcelain was omitted, the fourth manufacturer was excluded from the code. Furthermore, the Laundry Tray Association, including manufacturers of concrete laundry trays, was omitted entirely.

A mixture of vitreous china and porcelain is now used to some extent in the manufacture of bath tubs and other large pieces, (this information was supplied by the Crane agent in Washington), but these products were never deemed distinct enough from vitreous china to warrant separate mention in the code and there is no record of whether they were included or not. Steel sinks are one of the newer products in the industry and although without a doubt falling in the class of products performing the function of a plumbing fixture, nevertheless were omitted from the code.

Plated brass goods such as showers, bath fittings, lavatory fittings, etc., were expressly included in the code and are certainly products of long-standing in the industry, as the date of the organization of the Sanitary Brass Association testifies. It seems, however, that these fittings and other fittings, such as traps, overflow supply pipes, and valves, are manufactured by concerns:

(a) which specialize in plumbing goods;
(b) which manufacture still other valves and fittings;
(c) which manufacture a full line of copper and brass goods and the proportion of whose products in plumbing is small;
(d) which specialize in one kind of plumbing fitting, such as flush valves.

There are also variations in the above four classes.(*) Again at this point it is not so important to know what the various codes did with this conflict as to know that a conflict existed. The first two groups were included in the code by name, appearing under names of the Sanitary Brass Association and the National Brass Association, respectively. Two of the specialty groups classed under (d) above, namely, the flush valve manufacturers and tank trim manufacturers, were placed under the jurisdiction of the Code partly by their merging with the Sanitary Brass Association and partly by Code Authority action. (**)

(*) See Code History, Special Exhibits Vol. I

(**) See Vol. B for Sanitary Brass Association letter of 9/15/33 and Minutes of Code Authority Meeting of April 24, 1934, and C. A. Bulletin of July 21, 1934.

The Plumbing and Drainage Specialty Manufacturers, named above, early indicated a desire to be included in the Plumbing Fixtures Code. These were manufacturers principally of cast iron soil pipe fittings, used specially in plumbing, but they were not accepted in the code prior to its approval. (*)

Ferrous range boilers are considered a part of the plumbing fixtures industry and were taken into the code by an amendment approved on April 23, 1934, but the manufacturers of non-ferrous range boilers became governed by Supplemental Code No. 14 for the Non-Ferrous Hot Water Tank Manufacturing Industry, a division of the Code for the Fabricated Metal Products Industry.

B. Industry Size

1. Trend in Overall Industry Size

The plumbing industry is a part of the building industry and depends for its market principally on the volume of new construction as well as somewhat on the amount of home and other building modernization. New construction suffered very severely in the depression, when compared with the volume of industrial production. And although the volume of plumbing installation did not suffer so much, nevertheless, this outlet for plumbing was considerably diminished. Modernization and maintenance ordinarily furnish far smaller, although steadier, outlets for plumbing. Under normal conditions these two represent between ten and twenty per cent of the total, but in 1933 and 1934, they accounted for over sixty per cent of the plumbing goods sold. (**)

Some view of the relative size of the plumbing market, particularly in the field of new construction, may be gathered from an estimate made in 1929 (***), that 9.3 cents out of every dollar spent for building went into plumbing. In 1933, another estimate (****) indicates 12½ cents out of every dollar spent for building materials

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(*) Note: Excluded from the Plumbing Fixtures Code, this group was to its disgust included in the Cast Iron Soil Pipe Code when the latter was originally approved. The organization finally extricated itself from the latter and dropped into the Gray Iron Foundry Code where it remained ever after and where it continued a spirited jurisdictional dispute with the Cast Iron Soil Pipe Association.

(**) See Preliminary Report on the Construction Industry, Op. Cit. p. 148.

(***) Copper and Brass Research Association Survey reported in the Plumbing and Heating Market - Research Department of "Engineering Publications, Inc."

(****) Research and Planning Report

(which omits some of the building expenses included in the former dollar) goes into plumbing. Of course "plumbing" as used in these estimates means the whole plumbing system and not just fixtures.

The extent of the market for plumbing may readily be demonstrated by completely different figures indicating the absence of plumbing in use. Thus, according to statistics derived from the United States Census and Real Property Inventory, issued by the Bureau of Foreign and Domestic Commerce, and also from data compiled by the Edison Electric Institute, 6.85 per cent of all the urban dwelling units in the United States are without any interior water connections, 23 per cent are without bath tub facilities, and 16.5 per cent are without inside water closets. In farm dwellings, 83.[illegible] per cent are without interior water connections and 91.6 per cent are without bath tub facilities. (*)

The actual annual volume of plumbing fixtures has never been fully reported by any agency, public or private, for any single year. No two sources of data are comparable either in coverage or in unit of measurement. At the time of presentation of the code, the sponsors presented figures which are reproduced below:

Aggregate Annual Sales in Dollars (estimated) (000 omitted)

	1928	1930	1932	1933
Enameled Ware	$79,000	$33,000	$15,000	$15,000
Vitreous Ware	23,000	18,000	5,000	5,000
Plumbing Brass	33,000	26,000	7,200	7,200
Closet Seats	19,500	15,300	4,250	4,250
Total	$154,500	$97,300	$31,450	$31,450

Obviously the sales for 1932 and 1933 were not the same, but the 1932 figures were apparently considered a good enough estimate for 1933. The decline from $154,500,000 in 1928 to $31,450,000 in 1932 is considerable, the dollar volume in the latter year amounting to 20% of that in the former.

Census series giving the value of production in the industry are not at all comparable in coverage to the above sales data presented by the code sponsors either as to products or as to years included. The major division entitled "Plumbers Supplies," contained in the Census reports, is limited to case iron enamel ware, plumbers brass, sanitary seats and range boilers (both iron and copper). Total figures from 1923 through 1933 are reproduced below to indicate the trend in production over the period:

(*) Preliminary Report on the Construction Industry; Op Cit. p. 240.

Year	Value of Products (Thousands of Dollars)
1923	132,665
1925	167,878
1927	145,262
1929	129,674
1931	70,936
1933	46,886

The following census figures cover value of production in vitreous china ware, procelain ware, concrete laundry trays and other plumbing supplies, unspecified. Differences in reporting and in years covered make it impossible to combine these and the figures given above (*):

1927	54,076
1929	50,499
1931	22,724
1933	20,935

These figures indicate a continuous decline since 1925, which is not easily accounted for in view of the fact that the index of construction reached a peak in 1929. Employment figures also reached a peak in 1925. The Census of manufacturers reports 33,280 wage earners for that year in the "Plumbers' Supplies" Industry, 27,960 in 1929, 19,365 in 1931, and 16,221 in 1933.

In sum the picture is one of expansion until 1925, and then a 75% decline in production from that year to 1933 in terms of total fixtures and a 50% decline im employment. Of particular significance during the depression period are the census figures for vitreous china plumbing fixtures by number of pieces. In January, 1933, stocks on hand amounted to 500,000 pieces with shipments of about 90,000. In July 1933, stocks declined to 320,000 while shipments increased to 210,000. By December of the same year, however stocks had soared to 600,000 with shipments down to 50,000. A peak was reached in stocks in April, 1934, with over 700,000 pieces on hand This figure declined to 300,000 in April 1935, and was 350,000 in September 1935. Meanwhile shipments took an irregular course in an upward direction, finally reaching a peak in August, 1935, with 300,000 pieces and 250,000 in September (as reported by Bureau of the Census and released on October 26, 1935). If other series are at all comparable, these curves are a remarkable indication of results of the NRA period and afford good opportunity for contrast with prices of fixtures over a period of years.

2. Relative positions of component groups.

Code sponsorship by the joint committee headed by Governor Kohler was defended on the grounds that the associations were "truly representative" of the industry. The figures given were as follows:

(*) The first series were reproduced from Table XIII of the NRA, Division of Review, Statistics Section publication entitled "Statistical Materials No. 204. The Plumbing Fixtures Industry", January 1936. The second came from Census of Manufacturers, 1929. Vol. II, pp. 973-974, and from the Bureau of Census mimeographed release or "Plumber' Supplies", dated September 14, 1934.

Cast Iron Enamel Ware

Total concerns in industry (approx.)	21
" " " association (July 1933)	17
Representation by number	80%
Total industry volume (1932)	$15,000,000
" volume of members	$13,500,000
Representation by volume	90%

Vitreous China Ware

Total concerns in industry (approx.)	35
" " " association (July 1933)	23
Representation by number	66%
Total industry volume (1932)	$5,000,000
" volume of members	$4,500,000
Represented by volume	90%

Plumbers' Brass

Total concerns in industry (approx.)	100
" " " two associations (July 1933)	38
Sanitary Brass	26
National Brass	10
Representation by number	38%
Total industry volume (1932)	$7,200,000
" volume of members	$6,480,000
Represented by volume	90%

Sanitary Seats

Total concerns in industry (approx.)	35
" " " association (July 1933)	23
Representation by number	66%
Total volume of industry (1932)	$4,250,000
" " " members	$3,825,000
Representation by volume	90%

Obviously the 90% representation is neatly rounded so as to warrant assuming that these figures are approximations. Census figures for industry volume in cast iron enamel ware and vitreous china are considerably larger in 1933 than the above figures for 1932. Very possibly the total industry figures given above are low. In plumbers brass there are evidently many more than 100 concerns in the industry, judging from code activity alone, and volume of sales is largely unknown.

To recapitulate, the plumbing fixtures industry in reality consists in a group of manufacturing industries depending on a variety of materials and resorting to a variety of processes to produce a line of articles for use at the center of the modern sanitary system. Although expansion has taken place since 1900, nevertheless the peak was reached about 1925, with a production of over $200,000,000 and employment of around 35,000. The decline since then has been almost as great as in the construction industry as a whole. The potential market for plumbing, however, seems to be considerable, in view of the undeveloped state of the rural market.

C. The Members of the Industry.

There are over 200 concerns in the industry grouped in a number of associations, five of which sponsored the Plumbing Fixtures Code. Two of the associations sponsoring the code, namely, the Sanitary Cast Iron Enamel Ware and Sanitary Brass Manufacturers, were organized about 1895 and reorganized in 1927. The National Brass Association was organized in 1932, and the Vitreous China Plumbing Fixture and the Seat Manufacturers groups were not organized until 1933, although there may have been earlier organizations which were discontinued. The first two and the last two have the same association office and the same secretary.

According to an estimate made by a member of the industry on December 31, 1934 (*) seven companies make about 95% of the enamel ware; while in the pottery industry 11 concerns make about 95% of the ware; five of these accounting for 75%. Several of the companies belong to more than one of the associations, but there are really three large members of the industry, which are dominant because of overall capitalization, extent of national advertising, extent of plumbing lines manufactured, and sales volume.

1. Standard Sanitary Manufacturing Co.

(a) Position in the Industry. Standard Sanitary Manufacturing Co. is the largest company in the industry, manufacturing cast iron enamel ware, vitreous china ware, seats, and brass goods. The company was incorporated in December, 1899, in New Jersey, as a consolidation of several sanitary manufacturing companies. (**) In 1929, Standard Sanitary's capital stock was acquired by the newly formed American Radiator and Standard Sanitary Corporation. In the ensuing years the latter corporation acquired control over enough companies to place it in the forefront of plumbing and heating supply manufacturers. In 1929, the newly formed company took over C. F. Church Mfg. Co., largest factor in the sanitary seat industry, and Thomas Maddock's Sons Co., manufacturers of vitreous china plumbing. In 1931, the Central Supply Co. of Minneapolis and the Cochran - Sargent Co. of St. Paul, plumbing and heating jobbers, were acquired.

(b) Distributing System.

Standard Sanitary has its own far flung distributing system, which is not confined to the bounds of the United States. There are approximately 80 branch houses in the system which serve both as sales centers and showrooms, but which also perform the wholesaling functions of carrying stock and issuing price lists. These are located largely in the West and Middle West. The company also sells to independent wholesalers, some of which are required to confine their purchases to Standard, others of which are glad to be the representatives of this concern in their respective territories.(***) Products manufactured under the brand of Standard have an advantage over products put out by many companies of long standing which are not so well known. Wholesalers who handle plumbing fixtures in competition with branch houses receive price protection at the hands of the manufacturer. This is universally true among manufacturers

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(*) Submitted by R. E. Crane, Pres. Eljer Co., enclosed with letter of George Hoffman, of the Crane Co., to Asst. Deputy Pilkington, Feb. 8, 1935.

(**) Moody's Industrials 1935, page 350

(***) See letter from Washington -Eljer Co. to B. S. King, October 2, Code History Special Exhibit, Vol. I.

who own branch sales warehouses. Such protection takes the form of insuring wholesalers that branch houses will not sell below the wholesale suggested selling price. (*)

(c) Standard Sanitary Mfg. Co. vs. U.S.

The wholesaler, however, has also been the subject of attempted regulation by manufacturers. In 1912, the Standard Sanitary Manufacturing Co. appeared before the U. S. Supreme Court on appeal of a decision charging the company with violation of the Sherman Anti-Trust Law. (**) One of the charges was that of enforcing resale price maintenance on wholesalers. The case is of enough interest to warrant further discussion.

Around 1909, Standard Sanitary became owner of a patent covering an invention by a man by the name of Arrott, greatly improving the process of applying enamel to cast iron plumbing goods. At that time Standard produced 50% of cast iron enameled plumbing ware. Two other companies shortly thereafter took out patents on enameling which were alleged to be infringements on the first. In August, 1909, Edwin L. Wayman became secretary of the enameled iron association and conceived the idea of forming a patent pool. He persuaded Standard, Mott Iron Works and L. Wolff Mfg. Co. to give him options on their patents, then went ahead with a plan for fixing prices and eliminating seconds. (Seconds were particularly obnoxious to the three with the new enameling process, because the other companies produced them in abundance, and because they existed as effective competitive products on a price basis). In March, 1910, the association had formed a price and schedule committee of five to establish terms for leasing the patents. By this time sixteen companies had entered into the agreement. The results are best summarized by the court:

> "Defendants (in District Court) represent the Standard as the dominant ... and the only honest manufacturer, pointing out to other manufacturers the worthlessness of their output, they not having the Arrott patent; also the dishonesty of *** putting out 'seconds'. the inferiority of which was discernible only by experts' *** thereby *** 'discrediting the ware and demoralizing the market and business'. To avert these evil results, *** the Standard was willing to forego the advantages which its ownership of the Arrott patent gave it and confer them upon the other manufacturers. But upon terms, 'First and foremost' *** that no 'seconds' should be marketed. In the second place, a standard price must be agreed to so that henceforth rivalry should be 'in the quality of the ware turned out at a uniform price or in any other collateral inducement to the purchaser' that would not 'affect the quality of the ware'. Wayman's agency and

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(*) The above statements are based on a compilation of material appearing in the Deputy's files particularly the complaint letter contained in Special Exhibit, Vols. I-III of the Code History, also from a personal interview by the author with the Washington representative of the Crane Co., on January 10, 1936.

(**) Standard Sanitary Mfg. Co. et al vs. U. S. of America, 226 U.S. 20, 33, 8 Ct. 9, 1912.

office *** was that of 'watching all parties and insuring their fidelity to the agreement by the payment of a royalty for the use of the invention'. And this ***is 'all there is *** to the case at bar, except that Mr. Wayman, instead of the Standard Co., was the originator of the scheme'***

"Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions but by the decision of the committee of six of their number, and zones of sale were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the cooperation of 85% of the manufacturers and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument, 'cash bail'. The royalty for each furnace was $5.00, 80% of which was to be 'forfeited as a penalty' if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90% of the jobbers in number and more than 90% in purchasing power joined the combination."

Standard's share in the business has decreased slightly since 1910. The source referred to above estimated that 40% of the cast iron enamel ware is now sold by the company. In vitreous china and in sanitary seats, through C. F. Church Co., Standard is the largest producer. American Radiator and Standard Sanitary employed 30,850 in December 31, 1934. Both because of size and prestige Standard is the price leader in the entire plumbing field. (*)

As the story of the code period will indicate below, the wholesalers have not been out of harmony with the move for resale price maintenance. The company's branch houses are important factors but to what extent Standard relies on them is not known. How the company's distribution system developed and why it took this particular form are two more of the questions that remain unanswered on the basis of the available material.

2. Crane Co.

(a) Industry Position.

The history of Crane Co. is very similar to that of Standard Sanitary. Crane was first organized in 1855, "incorporated in 1865 to manufacture and

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(*) See Special Exhibit. Vol. I and II op. cit.

deal in valves and fittings in grey iron, malleable iron, brass and steel, for steam, water, gas, air and oil lines", also to manufacture sanitary enamelware and pottery, plumbers' brass goods, wrought pipe, boilers, radiators, and general plumbing supplies. (*) The company has about 165 branch houses through the country and some as well in foreign countries. It employed on March 1, 1935, about 12,000 people.

Crane ranks next to Standard in importance from a point of size and output. As indicated above, it produces almost a complete line, including enamelware through Crane Enamelware Co., vitreous china through Trenton Potteries, another affiliate, and brass. In the last named, Crane is particularly important, ranking among the largest valve and fittings manufacturers, and is the price leader in that industry.

Trenton Potteries Co., has been the leader in vitreous china, just as Standard Sanitary has led in cast iron enamelware. The former company was incorporated in New Jersey in 1892 and shortly thereafter acquired five other pottery companies located in Trenton. In 1924 it absorbed still another. The first five were disposed of in one way or another and replaced by two modern potteries, employing 750 people on December 31, 1934. (**)

(b) U. S. vs. Trenton Potteries

In 1927, Trenton Potteries came into the U. S. Supreme Court as defendant in a government appeal on a case involving the anti-trust laws.(***) This company and 22 other corporations

> "were convicted in the District Court of the Southern District of New York of violating the Sherman Anti-Trust Law. The indictment was in two counts. The first charged a combination to fix and maintain uniform prices for the sale of sanitary pottery in restraint of interstate commerce; the second, a combination to restrain interstate commerce by limiting sales of pottery to a special group known to respondents as 'legitimate jobbers' ****.

Although the Court of Appeals reversed the ruling of the lower court, the Supreme Court sustained the latter.

These potteries were organized in the Sanitary Potters' Association, members of which manufactured and distributed 82% of vitreous china plumbing fixtures. The association did not contend that the original verdict was not supported by sufficient evidence that the members combined to fix prices and limit sales in interstate commerce to jobbers, but argued that such price fixing was necessitated by the state of the industry and that the prices were reasonable. In a memorable decision the Supreme Court replied in part that:-

> "it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable."

(*) Moody's Industrials 1935. page 771
(**) Moody's Industrials, Page 771
(***) U.S. vs. Trenton Potteries, et al, 273 U.S. 392-47 S Ct. 377 - 1927

Trenton Potteries was not owned by the Crane Company at the time the activities complained of were going on. The merger was under consideration from 1923 on, and was finally effected in 1926. Although the Trenton Potteries case was not finally settled in the U.S. Supreme Court until 1927, the litigation had originated about the same time as the first negotiations for absorption. Previous to 1926, Trenton had made all of Crane's pottery, and the former's trade status has always been such that, from 1926 to date Trenton has continued selling some pottery under its own brand name. In this respect the Trenton Company enjoys a status similar to that of C. F. Church Company, Standard Subsidiary, (*)

(c) Distributive System

At first glance, it seems difficult to understand the interest of Trenton Potteries, Crane's subsidiary, in controlling jobbers. Possibly Crane's plan of distribution had not in 1927 reached the stage of development it has reached now. (But as will be seen later, Crane is still interested in controlling distribution). This company and its subsidiaries have the services of around 160 branch houses to distribute all their products and no independent wholesalers, except as independent wholesalers buy from branch houses, and except where the Crane Co. uses a well established wholesaler in a particular community as an exclusive distributor. (Discounts given inthe two cases are not similar. In the former case 5 to 10 per cent, in the latter, 20 to 30 per cent.) Probably Crane's system of distribution is the most complete of any in the industry. Unfortunately, data are lacking to indicate how Standard Sanitary and Kohler, the other members of the Big Three, compare with Crane either in actual distributive methods or in volume of sales. (In estimates made to Assistant Deputy Administrator Pilkington, Standard wassaid to produce 40% of the enamelware, Crane, 13%, Kohler 11%. All three were among the five producing 75% of the country's vitreous china pottery.) Crane does not produce seats, but usually furnishes Brunswick-Balke-Collender or Duro-wood seats.(**)

3. The Kohler Co.

About Kohler there is practically no recorded information in NRA files and the company is not listed in Moody's or Poor's. The concern is a producer of enamelware, vitreous china, brass, and seats. The most important fact evident through NRA history is personal influence of Governor Kohler. Kohler was Chairman of Code Authority throughout the code period, and his company's legal counsel, Mr. Chase, was loaned as legal counsel to the Code Committee and then to the Code Authority, and probably had more to do with the writing of the code than anyone else. (***) How long Kohler has

(*) From interview with Washington representative of the Crane Co. op. cit.

(**) Material used in this section obtained from the same sources as that used in Section 2 of the discussion of Standard Sanitary.

(***) See Code Authority's Minutes of Meetings January through April 1934.

maintained this position and the extent of his influence, would seem to be most important to an understanding of the Industry's problems. (*)

D. Distribution

It is surprising how little is known about product distribution in this industry. Certain details stand out prominently now, largely because they were sore points during the life of the code, and we known that the manufacturers have in the past given some thought to the subject because it played an important part in the two anti-trust cases in 1912 and 1927. Producers in the industry considered it essential to exercise some control over members of the industry next in line, most of these being wholesale plumbers. It was pretty well understood that if the wholesale plumbers were not averse to control, sales of fixtures would be limited to them, and even more specifically to those among their number who observed the manufacturers' prices and conditions of sale. (**)

1. The Master Plumbers

Even prior to 1912, however, another branch of the plumbing industry, namely, the Master Plumbers, showed activity in this respect. In the introduction to the Cast Iron Soil Pipe Code, No. 18, as approved September 7, 1933, appears a report of Deputy H. O. King on the final draft of the proposed code. In connection with Section 8 of the code he said:

> "It is essential to point out here that this industry, while small, is a part of the large plumbing goods industry and any decision here would have a material effect and possibly set a precedent for the whole plumbing goods industry.
>
> "In 1888 the Master Plumbers of the United States met in Baltimore, Maryland, and agreed that they would not buy from any manufacturer or wholesaler who sold direct to the consumer.
>
> "This arrangement was particularly effective and for many years it was practically impossible for any consumer to buy any plumbing equipment from anyone but a plumber, who in turn in almost every case insisted on installing the equipment or making repairs.

(*) Kohler uses no branch houses, but exclusive distributors instead. Interview with Washington representative of Crane Co., op. cit.

(**) See excerpts from court cases, appearing above, also letter of December 16, 1933, from Wolverine Brass Works to Malcolm Pirnie, Deputy Administrator, Code History, Special Exhibit Vol. II

"About twenty-five years ago, the mail order houses entered the field and a bitter fight has been waged ever since. The mail order houses have made very considerable headway and in 1930 one firm is reported to have transacted thirty million dollars' worth of business.

"In order to obtain material and supplies, the mail-order houses have patronized certain concerns in each branch of the plumbing goods business and these concerns have in turn been to a large extent boycotted by the wholesalers and plumbers.

"As a result, there has developed in the plumbing goods industry two groups of manufacturers - one smaller group selling to mail order houses and the other large group selling only through the wholesaler and plumber.

"The Cast Iron Soil Pipe Association, dominated by those manufacturers selling through the wholesalers and plumbers, originally insisted on eliminating the mail-order houses, but in conference agreed that these concerns had definitely established a place in the industry, bought in large quantities, carried stocks, and were entitled to prices equal to their most favored customers, buying as they did in equally large quantities.

"At the Public Hearing no one representing the plumbers appeared or entered any objection.

"Three weeks after the public hearing, over a hundred telegrams were sent to the Administration from organizations of plumbers protesting the rating of mail-order houses and demanding that the mail-order houses be classified as retailers.

"A representative group was invited to Washington to present their case. They insisted that mail-order houses be put in the same classification as plumbers regardless of the fact that mail order houses purchased in large quantities, carried stocks, and had a material investment in these stocks.

"They advised that unless their demands were granted they would flood the Administrator with telegrams from the fifteen thousand plumbers of the country.

"The mail order houses buying in large volume could easily set up wholesale plumbing divisions and the plumbers could gain nothing by having the mail-order houses classified as retailers.

"Regardless of the question of the merit of mail-order merchandising, the facts are that they have established themselves in our economic system, and it would be unfair to discriminate against them***."

A discussion between Deputy Administrator King and representatives of the master plumbers at a January, 1934, hearing on the Cast Iron Soil Pipe Code proved Mr. King to be essentially correct in his statement. Mr. King's account of the Baltimore resolution, after some argument, was acknowledged to be substantially accurate. As for the statements regarding the time of entrance of mail order houses into the field, the amount of business done by mail order houses, the extent of the boycott against certain manufacturers who sold to mail-order houses and against wholesalers and manufacturers who sold direct to consumers, no direct evidence is available in the NRA files. Many statements have been made by administrators, advisory representatives on the codes, members of several industries, and others who have had experience in the field of construction, all tending to bear out King's contentions.

2. Customary Distributive Methods in the Industry

Regardless of the success of any group in attempting to control the channels of distribution, the few facts at hand indicate that the customary method of distributing plumbing fixtures and accessories has been from fixture manufacturer to plumbing wholesaler to plumbing contractor or master plumber. The third link in the chain has in the past both sold and installed the plumbing fixtures. In his capacity as retailer, the plumber has usually maintained a regular place of business and sometimes a showroom for plumbing equipment. In the dual capacity of retailing and installing, the master plumber collects two fees, one for the building labor and another the retailer's discount, which varies from 5 to 50%, depending on the products. (*) The statement has been made frequently that in cases where the consumer bought direct from the plumbing wholesaler, the latter sold him at the retail price and gave the master plumber the difference between the two even though the sale did not go through the latter. Whether the plumber who received this payment was one who installed the fixture or whether such donations were polled within a locality is not stated nor is there anything to prove that the practice has taken place at all.

(*) See brief of Ernest F. Flentje at Plumbing Fixtures Hearing of July 24, 1934, letter from plumbing contractors to Mansfied Sanitary Pottery, Code History, Exhibit N and Special Exhibit Vol. V.

3. The Plumbing Wholesaler

The plumbing wholesaler as originally defined in the approved Plumbing Fixtures Code performs functions of "purchasing in wholesale quantities", and of "assembling, warehousing, and bulk selling of accessory and complementary products". Furthermore he "sells plumbing supplies to retailers or to the retail divisions of his own business; has a proper investment in his business"; and maintains "an adequate showroom, a warehouse, and sufficiently complete stock of such commodities to meet the normal plumbing supply requirements of his trade in his territory, and maintains an adequate bookkeeping system, sales office, and delivery service".(*) When handling the goods of one of the larger companies, the plumbing wholesaler frequently confines himself to the single-manufacturer's line. When wholesaling for smaller companies the short lines of several companies are pieced together. There are approximately 1300 such wholesalers in the country. (**) In order to hold their wholesalers, it was customery for the smaller manufacturers to sell at a slight differential below that of the larger manufacturers. Excerpts from two letters from the Washington-Eljer Co. of Los Angeles, California, to the assistant deputy, throw some light on the situation:(***)

"October 2, 1934..

"Out industry, so far as prices and practices are concerned, is practically or wholly controlled by the nationally advertised manufacturer who manufactures and distributes their products throughout the whole United States. Some of these manufacturers own or control their distributors and they can dictate policies to their distributors and compel them to follow their instructions.

"****Let us take a community, either large or small, as the conditions exist.

"In said community you will find a branch of each of the national advertised lines and if not a

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(*) Plumbing Fixtures Code, Article VIII, Section 7. In view these exacting requirements for membership in the plumbing wholesaling fraternity, which are meant, presumably, to be indicative of the important services performed by that class of trade factors, one wonders why it was necessary to provide for the wholesaler's protection through a wholesaler-retailer differential.

(**) Engineering Publications, Inc., Plumbing & Heating Market Service.

(***) Code History - Special Exhibit, Volume I.

branch the nationally advertised companies will have picked out the largest and best distributors in that community giving them free ware-housing service, salesman assistance, catalogues, literature, service, etc.****

"It leaves nothing for independent manufacturer so he is compelled to establish his outlets to the best of his ability for his distribution which takes in large master plumbers, wrecking yards and direct to you dealers. These dealers are handicapped by not having the services of better known publicly accepted merchandise so they are compelled to reduce their selling price to overcome this handicap and when this is found out the larger manufacturers reduce the prices to their distributors which reflects back to the manufacturers and then it is a series of price reductions, until the independent manufacturers are forced to close up, throw men out of employment and add to the downward trend of business*****."

"October 10, 1934

"As I stated to you before, I feel that the Standard Manufacturing Company, manufacturers of enameled ware and pottery, control the plumbing industry on China and enamel ware for the simple reason that they establish the selling price at which our merchandise must be sold. As I outlined before, the national acceptance which their product has among architects, engineers and even the ultimate consumer makes the 'independents' merchandise harder for the distributors to sell and there are many other reasons why the nationally advertised manufacturer should allow the independents a little differential on selling price--I should say Five Per Cent."

The statements of this one company are duplicated by other companies which wrote to Assistant Deputy Pilkington in answer to a question regarding the operation of the code.

4. Exceptions to the Customary Methods

The manufacturer to wholesaler to master plumber relationship is not any too simply by itself. And there are complicating factors outside of this line of descent.

In the first place, Crane and several others have branch houses which are direct competitors of the wholesalers. In the second place, there are wholesale hardware houses which have no respect for the traditional character of plumbing fixtures and which sell such goods in the same way as they sell other goods, over the counter, or to

retailers who sell over the counter. The hardware wholesalers frequently handle competing lines of plumbing equipment, but in other respects are quite similar to wholesale plumbing establishments and frequently their sales are made to master plumbers in the well established manner. Plumbing fixture manufacturers made no attempt to distinguish plumbing wholesalers from hardware wholesalers in their code, but trouble between the two latter groups was enough to keep the Wholesale Plumbing Code from ever taking effect after approval.(*)

Third, there are the mail order houses and the "direct-to-you's", whose share in the wholesaling business over the past five or six years has been variously estimated as from 5 to 33-1/3%. These concerns combine the retailing function of the master plumbers with the wholesaling functions of the wholesale plumbers and hence eliminate one step. Plumbing fixtures bought from mail order houses and direct-to-you's are usually installed by master plumbers. Whenever these distributors take the responsibility for a unit completely installed, they employ master plumbers to perform the work. (**) But not infrequently their sales are to consumers who install their own ware. The mail order house method of buying is as distinctive as the selling method and is presented in its most favorable light in a letter from E. J. Condon of the Mail Order Association of America to General Johnson on August 30, 1933, in part as follows: (***)

> "1. A source of supply for a given line of goods is selected well located from standpoint of raw material, skilled labor, and distribution, of efficient size and equipment and whose capital structure does not require heavy corporate or management expenses to be added to prime costs of producing goods.
>
> "2. Orders are usually placed by members of the Association for anticipated requirements so that production of the merchandise ordered can be carried on during slack times, thus permitting a more even flow of work, steady employment, and regular income for the manufacturer with which to meet overhead expenses during dull periods and until the selling season arrives.

(*) See transcript of hearing on Wholesale Plumbing Code, December 17, 1934.

(**) Brief of M. O. Association of America transmitted to Deputy Administrator Malcolm Pirnie, October 15, 1933.

(***) Volume 3, Part I, NRA files.

"3. Members of this Association maintain warehouses for their needs throughout the country and do not ordinarily require such service from their suppliers.

"4. Most lines of goods are sold by members of this Association under their own trade name. Each member provides its own advertising material in the form of catalogs, circulars or newspaper space, and, consequently, receive none of the benefits of a manufacturer's advertising for his dealers in the form of displays, advertising material, leads or specialty salesmen. Similarly, the cost of selling our members is low compared to selling a like volume of independent dealers because one buyer can decide on a purchase equivalent to a thousand or more individual dealers.

"5. Sources selling members of this Association incur no bad collection losses, and, in fact, are often assisted financially by having raw materials purchased for them at advantageous times."

The sources of supply mentioned are manufacturers, usually of medium size. For example, Rundle Manufacturing Co., within the past three years producing from 10 to 12% of the enamelware in the country, sells to mail order houses and so does National Sanitary Co. which produces 8% of the enamelware. Both Eljer Co. and Universal Sanitary Co. sell to mail order houses, and they are the two which with the "Big Three" produce approximately 75% of the vitreous china in the United States.(*)

Although contracts between mail order houses and manufacturers have not been disclosed, it is well understood that they are on a cost-plus basis, calling for rebates at the end of six months, after the goods have been originally sold at the manufacturer's regular wholesale price. Frequently the mail order house takes around 60% of the output of a manufacturer. The other 40%, more or less, is sold through regular channels or to direct to you". (**)

Merchandising policies of mail order houses and"direct to you's"are thought to be fairly similar, although there is no proof of this in the files other than the fact that they were lumped in one class by the Plumbing Fixtures Code Authority.

No accurate figures exist to indicate the proportion of plumbing fixtures' volume going through mail order houses. In a brief filed at the manufacturers' code hearing on August 30,1933, the National Association of Master Plumbers stated that all but 4-5/10% of the retailing of plumbing supplies was done through master plumbers, as shown by the 1930 Census of Wholesale Distribution. This figure seems impossible to verify. On another occasion the plumbers claimed that no more than 6% of plumbers' supplies are sold by manufacturers direct to retailers, as indicated in the 1929 Distribution of Sales of Manufacturing Plants, and that the publication's definition of "retailer" included mail order houses.(***)

The following table is a composite of the figures given for [illegible] "Plumbers' Supplies" and those for "Vitreous China Ware":(***)

(*) Estimates all by R. E. Crane, President of Eljer Co., and another member of the industry to Assistant Deputy Pilkington in December, 1934. and undisputed by secretary of the Code Authority. op.cit.

(**) See Condon brief to Pirnie. op.cit.

(***) Bureau of the Census, pp.34 and 49. The questionnaires used by the Census in obtaining the information (p. 2) were not definite enough to make it certain where sales to mail order houses would be classified. In all probability, because of the wholesale and better than wholesale discounts given mail order houses, individual manufacturers reported sales to these factors in with sales to wholesalers. This seems to be verified by the figures for vitreous chinaware, alone, in which no sales to retailers are recorded. No class of trade contends that there were no sales of vitreous china to mail order houses in 1929.

Distribution of Sales of "Plumbers' Supplies" and of "Vitreous China Plumbing Fixtures" By Manufacturing Plants by Type of Customer and Agency. 1929.

	Value (expressed in thousands of dollars)	%	No. of Plants	Selling Exclusively
Total Sales	151,424	100.0	292	
Sales to wholesalers	95,611	63.2	244	145
Sales to Manufacturers' Own Wholesale Branches	35,674	23.6	35	6
Sales to Retailers	7,792	5.1	51	10
Sales to Manufacturers' Own Retail Branches	--	-	-	-
Sales to Industrial and Other Large Consumers	12,347	8.1	76	25
Sales to Household Consumers	-	-	-	-

The following table is more interesting, however, as it suggests a comparison of the sales by manufacturers through the various channels broken down into the product groups. (*) Percentages only are given in order to facilitate the comparison:

(*) Ibid. The breakdown of "Other Plumbing Supplies" was derived by the author and represents the difference between the total "Plumbers' Supplies (not including pipe and vitreous china sanitary ware)" and the figures for "Cast Iron Enamel Ware" and for "Plumbers Brass" which were all three given in the publication. This difference probably included range boilers, sanitary seats, and other unspecified plumbing goods.

Distribution of Sales
of All Kinds of Plumbing Supplies
by Manufacturing Plants, 1929.

Class	Total "Plumbers' Supplies" plus Vitreous China	Cast Iron Enameled Ware	Plumbers' Brass	Other Plumbing Supplies	Vitreous China
To wholesalers	63.2	53.3	75.0	60.0	70.3
To manufacturers' Own Wholesale Branches	23.6	46.7	3.7	18.2	26.7
To retailers	5.1	-	13.0	6.2	-
To manufacturers' Own Retail Branches	-	-	-	-	-
To industrial and Other large consumers	8.1	-	8.3	15.0	3.0
To household consumers	-	-	-	-	-

The figures presented above show considerable variation in the sales through manufacturers' branches, the fixtures manufacturers placing greater reliance on this outlet than the brass manufacturers. The distribution by the latter direct through retailers was proportionately greater than for any of the other products. But the table does not indicate what proportion of plumbers' brass goods were sold to fixture manufacturers. There are such sales and in considerable quantities. In fact this may be considered the fourth factor complicating the distributive system in the industry. The air tight rules provided in the code were found too rigid for this as well as for other variations in the prevailing distributive methods.

The fifth complicating factor is that large industrial organizations have been able to supply their own needs by buying direct from manufacturers. Sometimes the industrial consumer employs his own plumber on full or part time, sometimes he maintains a stock of goods for his own use. The important thing is that such consumers are obliged to buy in large quantities and have been able to get favorable

terms and prices from the manufacturers themselves.(*)

Another complication which is of great importance to at least one section of the country's plumbing market is the fact that the manufacturers on the West Coast have their own organization and their own distribution system. There are on the West Coast branch factories of the Big Three as well as several independent manufacturers. These concerns have enjoyed a freight advantage over the companies in the Middle West and East, which has enabled them to maintain a real separation. The distinction never became so important as when a code was negotiated for the country as a whole. The effects are recounted in the next section.

(*) From personal interview of year ago with representative of Washington Properties, real estate firm in Washington.

II. DISCUSSION OF CODE OPERATIONS BY CODE PROVISION

A. The Proposed Code.

1. Industry participation.

The proposed code for the plumbing fixture industry was presented to the NRA on August 19, 1933. There is very little information in the NRA files to indicate the procedure taken by the industry in code-writing previous to its presentation, except what is recorded in the transcript of the hearing of August 30, 1933. At this time Walter Kohler stated the code(*)was developed at successive joint meetings of the following five associations:

Sanitary Cast Iron Enamel Ware Association
Vitreous China Plumbing Fixture Association
Seat Manufacturers' Association
Sanitary Brass Manufacturers Association
National Brass Association

Final action on the proposed code was taken at a meeting of the association held at Pittsburgh on July 25, 1933, at which time the code was approved for submission to NRA. The transmittal and negotiations with the NRA were to be carried on by a Joint Coordirating Committee which was appointed at a meeting of the associations on June 21, 1933.(**)

The transcript of the August 30th hearing also contains the names of the members of the industry who favored submission of the code. Included as signatory parties to the code were all those who either voted for the code at the July 25th meeting, where the vote was unanimous, or returned a copy of the code bearing the company's signature indicating acceptance. Mr. Kohler's statement at the hearing contained this list of companies and also notations as to their membership in the trade associations and their dissents, if any, to specific rules of the code.(***)

(*)P. 6, Transcript of Hearing on Proposed Code for the Plumbing Fixtures Industry, August 30, 1933.

(**)Ibid., p. 78. The Committee consisted of the following:
Walter J. Kohler, Pres. of Kohler Co., Chairman
John Berryman, Pres. of Crane Co.
George A. Harper, Pres. Burlington Brass Works
Henry Held, Pres. Rundle Mfg. Co.
H. M. Reed, Pres. Standard Sanitary Mfg. Co.
and the following associate members:
L. A. Cornelius, Pres. Wolverine Brass Works
W. Keith McAfee, Pres. Universal Sanitary Mfg. Co.
George Van Arnam, Pres. Van Arnam Mfg. Co.
Counsel for the committee was Lucius P. Chase, of the Kohler Co.

(***)Ibid., p. 5 and Exh. A of Kohler's statement.

Meanwhile other groups affiliated with the plumbing industry had already expressed a desire to cooperate but had not yet, by July 25, joined in presentation of the code. These included the Plumbing and Drainage Specialty Association, the Shower Stall Manufacturers' Association, the Flush Valve Association, and the Range Boiler Manufacturers' Association.

2. The original proposed code.

(a) Contents.

The date of formal presentation to NRA by the Joint Coordinating Committee followed some slight revision which had taken place as a result of an informal presentation on August 8. There is no record of the results of this informal hearing with the Assistant Deputy and advisers, except Mr. Kohler's statement(*) that after the conference changes were made and the four identical codes for the four industries were combined into one. The proposed code presented to the NRA on August 19, 1933, contained the following general classifications:

Group A - Employment

Rule A-1	Child Labor
Rule A-2	Wages and Hours
Rule A-3	General Regulations
Rule A-4	Employment Reports

Group B - Unethical Trade Practices

Rule B-1	Discrimination (between purchasers of the same class)
Rule B-2	Secret Rebates
Rule B-3	Post-Dating and Pre-Dating
Rule B-4	Inducing Breach of Contracts
Rule B-5	Repudiation of Contracts
Rule B-6	Lump Sum Bidding
Rule B-7	Trade Marking
Rule B-8	Misrepresentation
Rule B-9	Substitution
Rule B-10	False Statements
Rule B-11	Commercial Bribery
Rule B-12	Protection (price advance or decline)

Group C - Marketing Policies

Rule C-1	Orders (stock 30 days, specific job)
Rule C-2	Invoices
Rule C-3	Standardization of Products
Rule C-4	Grading
Rule C-5	Inspection
Rule C-6	Consigned Stocks
Rule C-7	Classification of Customers

(*) Ibid., P.9

Group D - Costs and Prices

Rule D-1	Selling below cost
Rule D-2	Minimum Prices
Rule D-3	Terms of Sale
Rule D-4	Published Lists
Rule D-5	Close-outs
Rule D-6	Resale Prices

Group E - General

Rule E-1	General Definitions
Rule E-2	Enforcement
Rule E-3	Monopolies
Rule E-4	Amendment and Termination
Rule E-5	Presidential Control
Rule E-6	Effective Date

Schedule U - Maximum Hours, Minimum Wages

Schedule V - List Prices - Determination deferred for present.

Schedule X - Trade Discounts " " "
Cash Discount -
Credit Terms -
Freight Allowances - Remain unchanged for present.
Showroom Discount -
Schedule X - Resale Prices - Determination deferred for present.

There followed the constitutions and membership lists of the five respective associations.

Group A and Schedule U after some revision appeared as Articles III and IV of the approved code. Rule E-1 appeared as Article II. Rules E-2, E-3, E-4, E-5, E-6 became Articles IX through XII of the approved code; all after slight revision. With the aforementioned provisions this report is not primarily concerned, except incidentally with the effects of omitting certain industry groups from the code, the incidence of code enforcement, and the unusual clause providing for modification by the President. The provisions of principal importance to this report are of course those having to do with distribution and prices included in Groups C and D and Schedules V, W and X, and also the trade practices of Groups B and C where they affect the distribution problem under the code.

Many of the proposed trade practice clauses are easily identifiable in the approved code and were approved with little change. The provisions of most importance to this study, however, were also those over which there was the greatest amount of controversy both before and after approval of the code. Even so, the pre-approval discussion of the provisions gave no forewarning of the degree of opposition to them (even in considerably revised form) after the

code became effective. These distribution, price and cost provisions will receive preliminary discussion as a group because most of the early comments linked them together and also because they were revised as a group.

(b) Industry acceptance of the original code.

As indicated above, Kohler's statement included a list of the companies assenting to the code and their objections to specific clauses.(*) Industry by industry this list indicates that of the 19 known manufacturers of cast iron enameled ware, 18 approved the code and one did not participate in the presentation. All but two of the 19 were members of the association (the non-participant being a member). Seven of the 18 participants objected to one or more of the provisions, only one of the seven having an objection to a labor provision, all the others to trade practices.

Of the 34 known manufacturers of vitreous ware, 26 participated in the presentation, five of the remaining eight signifying a desire to cooperate. Only three of the 26 were non-members of the association, while only three of the remaining eight were members. Six of the 26 signers participated conditionally and these six included the three non-association members. All objections were to trade practice provisions.

Sixteen manufacturers of sanitary seats presented the code for the industry. Al 16 were association members and participated unconditionally. There were 15 more seat manufacturers who did not participate, however. Eight of these were also members of the association and these eight and one non-member signified a desire to cooperate. There is no indication in the files of what expression was considered indicative of a desire to cooperate in connection with this or with any of the other groups. The record does indicate that during the course of the code history, some of these became code members.**

Fifty-two manufacturers of plated brass fittings are listed in Mr. Kohler's statement but a note at the end of the list adds that estimates of the number manufacturing some of these products range from 75 to 150. Forty-eight of the fifty-two participated in presenting the code. Ten of these 48 were members of the Sanitary Brass Association, 24 were members of the National Brass Association, and 14 were members of neither. The four who did not participate all signified a desire to cooperate. They were, all four, members of the Sanitary Brass Association. Twenty-eight of the 48 gave unconditional approval to the code. Eighteen of the other 20 objected to various trade practice provisions; the other two to the general industry definitions. (Rule E-1)

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* Ibid. Kohler's statement, Exh. A.

** See Code Authority Bulletin No. 15.

In all, 108 companies participated in presenting a code for the industry, but this number includes duplications because of membership in more than one association. Excluding these duplications and all affiliations, 93 separate concerns signed the proposed code and 26 (or approximately 30%) of these objected to individual trade practice provisions. There were 22 objections to Rule D-2, Minimum Prices; 13 to C-6, Consignment; 11 to D-1, Selling below Cost; and 10 each to Rules C-7 and D-5, Customer Classification and Close-outs, respectively, and a scattering among the other provisions.

3. Organized Objection to the proposed Code.

(a) Pacific Coast Manufacturers.

Two companies situated on the Pacific Coast sent representatives to the July 25th meeting of the five associations in Pittsburgh. These two, Washington-Eljer and Westcoast Sanitary, were both members of the Sanitary Cast Iron Enamel Ware and the Vitreous China Plumbing Fixture Associations. At the industry meeting Mr. Bonner and Mr. Troeger, the respective representatives of the two concerns, assented to the proposed code with certain objections, and on August 24, 1933, Washington-Eljer and Westcoast Sanitary joined with nine other companies (one affiliated with Washington-Eljer) in submitting a brief attacking the trade practice provisions previously criticized by the first two.(*) All 11 companies assented to the code but objected to the form, although not the purpose, of Rules C-6, Consigned Stocks; C-7, Customer Classification; D-1, Selling below Cost; D-2, Minimum Prices; D-5, Close-outs. Changes in some other clauses were also suggested but criticism of the foregoing was more fundamental.

The whole point of the group objection is contained in the following paragraphs from the brief.(**)

> "We suggest the insertion of the following immediately succeeding the present preamble in the Code, andimmediately preceding Group 'A' - Employment: 'For the purpose of this Code the United States shall be divided into regional territories, of which, at least one, shall be the Western Territory as hereinafter defined, namely California, Oregon, Washington, Arizona, Nevada, Western Texas, Hawaiian Islands, Philippine Islands, and Alaska.'
>
> "Purpose of above Suggestion:
>
> "We feel that the above suggestion is necessary because of the fact that the cost of manufacture of products of this industry on the Pacific Coast is higher than the cost of similar products when manufactured in the East; and further because the cost of like materials to Eastern manufacturers when delivered

(*) Brief of Westcoast Sanitary, et al, Aug. 24, 1933, Vol. "A".
(**) Ibid., p. 2.

> into this territory is higher than when delivered to other sections of the United States not in this territory if their costs are accurately computed by adding the actual freight required to move their products from the East into the so-called Western Territory." (original underlining - L.B.L.)

The brief goes on to point out that costs of raw materials and hourly wage rates are both higher in the West than in other parts of the country and that the wage minimum required in California by law is higher than that provided in the proposed code. To Rule A-2, Wages and Hours, which enjoined failure to comply with code wages and hours, the Western manufacturers proposed the addition of the phrase "for each territorial division of this code". This change, of course, would have made territorial wage rates desirable. B-1, Discrimination, prhibited discrimination "in prices, terms, discounts, allowances, guarantees, or in any other way between purchasers of the same class" to which the Western manufacturers suggested the addition of the phrase "in the same territorial division".(*)

Rule C-6 in the July 25th proposed code read as follows:

> "It shall constitute unfair competition to consign stocks of the products of this industry to distributors, contractors, manufacturers' agents, and/or others....."(**)

This the Western group would have amended to permit consignment to wholesalers "as long as the manufacturers maintain warehouse stocks at other than what are commonly known as manufacturing points", which points are named in the proposed revision, and to allow existing consignment contracts with distributors to run until their expiration dates.(***) This proposal, like the others, was designed to place the Western companies in a better competitive position with the warehouse of the "big three" located on the coast. These warehouse stocks, at other than the commonly known manufacturing points, so the argument ran, were used to supply wholesalers in small quantities at the same prices which the latter obtained at manufacturing points. "This tends to discriminate against the small manufacturer who is not in a position to maintain warehouse stocks to parallel those of other manufacturers at locations other than manufacturing points..... and would be forced to charge his customers the difference between LCL and carload freight on small shipments."

The eleven Western manufacturers considered customer classification to be the most important industry problem and proposed an entirely new Rule C-7 to take the place of the provision accepted by the industry. This proposal had as its theme the "Reclassification

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(*) Ibid., p.5
(**) See July 25, 1933 Proposed Code in Vol. A.
(***) Brief of Westcoast, et al, op. cit. p. 6

of customers on a promotional sales basis". Visible merchandising effort by the distributor, rather than mere volume of purchases, was to govern the classification scheme. The Western manufacturers not only urged a proper classification but heartily favored the fixing of trade discounts for each class or sub-class, such discounts to be uniform within the sub-class and mandatory on all manufacturers.(*)

Three general classes were proposed - wholesalers, retailers, consumers. The first was defined as one who sold to retailers, the second as one who sold to consumers. Manufacturers, when selling through branch houses were included in the definition of wholesalers. Three sub-classes of wholesalers were provided, depending on the size of showroom maintained. Retailers were given four sub-classes, the first applying to chain retailers having showrooms. The variations in retailers depended on the number of sales locations as well as showroom size. As an exception to the rule, all Government purchasers were placed in the second sub-class of retailers.

A complete set of trade discounts was also furnished in the proposal, to take their place in Schedule W.

Revisions proposed in the original Rules D-1, D-2, D-5 and D-6 were in line with the contention by the Pacific Coast manufacturers that the code should enforce territorial distinctions. Rule D-1, for example, prohibited sales below a "reasonable standard cost of producing and marketing" the products. The Western manufacturers suggested placing both the "cost" and the "sales" on a territory basis. The rule would then have prohibited selling products "in any territorial division of this country" below the "cost" in such "territorial division of the U. S." Changes proposed for Rule D-6, Resale Prices, were very similar. Rule D-2, Minimum Prices, was to be amended in a similar manner and it was suggested that the minimum prices for the Western territory be "at least ten per cent higher than the minimum prices for the Eastern territory on the same articles until uniform cost finding methods have developed actual cost differences."(**)

Rule D-5 in the July 25th edition of the code permitted the sale of "close-outs" below cost, under supervision of the pertinent association. The clause proposed by the Western group would have permitted these sales "only in the territorial division in which said products were produced". The evil to be legislated against in this case, so the argument ran, was the practice of dumping engaged in by Eastern manufacturers selling on the Pacific Coast.(***)

The manufacturers on the Pacific Coast felt very strongly on two subjects; first, what they termed a territorial discrimination centering around freight absorption by the Eastern manufacturers, and second, a demoralized distributive market. In regard to the latter, the Western group felt, if possible, even more strongly than the other

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(*) Ibid., pp. 6,7 and 13
(**) Ibid., pp. 7 - 9.
(***) Ibid., pp. 8 - 9.

manufacturers in the plumbing fixtures industry. The former believed in a rigid and detailed customer classification and definitely proposed the discounts to be put into effect through code action.

(b) Wholesalers.

Wholesalers' associations registered three objections to the code proposed for the plumbing fixtures industry on August 19, 1933 (i.e. the July 25th edition).

At the hearing on August 30, Mr. Claude W. Owen, representing the Joint National Committee of Wholesalers appointed by eight wholesalers' associations, objected to Rule C-7, Classification of Customers. This provision, as originally proposed by the manufacturers, established five principal classifications as follows: wholesalers, contractors, mail order houses and "direct-to-you" houses, retailers and consumers. Definitions were provided for each class and separate definitions for mail order houses and for "direct-to-you's". The rule ended with the statement that:

> "Any of the above classes may be further subdivided by the association on the basis of volume of purchases or any other valid distinction." (*)

The objection of the wholesalers to this provision was rather fundamental and consisted in the contention that there should be only two classifications, namely, wholesalers and retailers; the mail order and "direct-to-you" houses to be included in the latter. Any singling out of the group of mail order and "direct-to-you's" meant, so Mr. Owen feared, a special price consideration for that group. In both the oral and the later written presentation, the Joint National Committee stressed the importance, in numbers, of wholesalers, handling 80% of the wholesale business, and master plumbers, of whom there was an estimated 25,000. The wholesale associations decried any discrimination against these two groups. (**)

In a brief of September 5, 1933, the Joint National Committee of Wholesalers expressed opposition to Rule D-3 and Schedule W of the original proposed code. The rule prohibited giving purchasers more favorable treatment than that established in the maximum credit terms to be found in Schedule W. The wholesalers objected to the terms appearing in the schedule on the grounds that two discount periods, as proposed, would work a hardship. They requested instead that 2% 10th of the month following delivery be substituted.

Schedule A also provided for trade discounts, although determination of these was deferred. The wholesalers, in the brief of September 5, expressed themselves as very anxious to know what mandatory discounts would be provided, contending that "the discounts in effect have been the source of a bitter depressing argument for many years".

(*) Proposed Plumbing Fixtures and Fittings Code as submitted August 19, 1933, pp. 4-5, Vol. A.

(**) See Transcript of Hearing, Code Record, Vol. III, p. 103, and September 5, 1933 letter from E. G. Schafer to Pirnie in Vol. B, Part I.

Furthermore, they registered a resolution urging:

> "That new adjusted List Prices on Enamelware, Vitreous China, Brass and Seats, subject to a discount to Wholesalers of 40% on Staple Items and 40-10% on slow moving items (subject to such further preferential for volume as may be suitable to Manufacturers) subject to cash discount terms of 2% instead of the current 5%, be issued and made effective at the earliest possible time." (*)

(c) The Plumbers.

The National Association of Master Plumbers presented a statement for the plumbers at the public hearing of August 30, 1933, and also filed a brief on September 9 which covered the same points. (**)

In the first place the plumbers' association objected to Rule C-4, Grading, which, as proposed by the manufacturers, read as follows:

> "It shall constitute unfair competition for a manufacturer to sell in this country other than first grade material guaranteed against manufacturing defects. Such guarantee shall be uniform among all manufacturers, and shall provide for furnishing new material of the same type and size to replace that which has proved defective on the same basis as the original purchase, but it shall not cover charges for labor or consequential damages, nor shall it specify any guarantee period."
> (underlining mine - L.B.L. Author).

The plumbers recommended elimination of the portion underlined above on the grounds that it was "unfair to have the contracting and retail branch of the plumbing industry assume the entire expense in connection with the replacement of the manufacturers' defective items". In fact, a recent report of a special committee of the NAMP has stated in rather strong terms the conviction that manufacturers should stand the entire expense of upholding "their nation-wide and liberal guarantees on such goods to the consuming public." Such expense would, of course, include the cost of labor and incidental materials. But this committee had taken in its positive recommendations what it considered a cooperative attitude, in proposing a kind of joint responsibility, with reserve funds set up and held by the manufacturer, with either individual settlement by the manufacturer and master plumbler, or with settlement through the use of a representative committee, for the damage or defect and the work expended in replacement. This procedure the NAMP suggested for inclusion in the manufacturers' code. (***)

(*) See: Brief of Joint National Committee of Wholesalers of Plumbing and Heating Supplies - Vol. B, Part I.

(**) Transcript of August 30 Hearing, pp. 75-86 for former, Vol. B, Part I for the latter.

(***) Transcript of Hearing, pp. 75 - 82.

A second criticism of the proposed code applied to Rule C-7, Classification of Customers, and in this the positions of the Pacific Coast manufacturers, the Joint National Committee of Wholesalers and the National Association of Master Plumbers appear remarkably similar, at least in their objection to the "prominence" given to the mail order houses and the "d-t-u's".

The master plumbers offered the following as a substitute for the rule as it appeared in the July 25th edition of the proposed code:

> "Customers shall be classified as wholesalers, Contracting and Retail Master Plumbers, 'other sources' and consumers, according to the position in the distributing process which they occupy respectively.....
>
> "For the purpose of this Code a 'wholesaler of plumbing supplies' is defined as an establishment buying plumbing supplies in large quantities, and stocking and distributing them exclusively to plumbing contractors.
>
> "A Master Plumber shall be defined as follows:
>
> "1. He shall have passed a satisfactory examination covering technical training and have had satisfactory experience in the engineering and manual aspects of this industry.
>
> "2. He must have a license in conformity with the requirements of the area in which he operates, or be capable of making a satisfactory installation under the "Code of Minimum Plumbing Requirements" issued by the U. S. Bureau of Standards or the National Plumbing Code adopted by the NAMP in June 1933, where no licensing law exists.
>
> "3. He must be an employer of labor, and must have an established place of business, devoted to the plumbing business.
>
> "With the exception of the Wholesaler and the Master Plumber, defined in the foregoing paragraph, all others engaged inthe business of purchasing and selling plumbing supplies shall be classed as retailers.
>
> "All other purchasers of plumbing supplies are defined as consumers.
>
> "Any of the above classes may be further subdivided by the Association on the basis of volume purchases."

As in the case of the wholesalers, the changes recommended by the master plumbers indicated a fear of the mail order and "d-t-u" establishments and resulted in similar proposals, namely, refraining to place these concerns in a separate category. Without the establish-

ing of mandatory discounts, as provided in Schedule W, which could have enforced such a status, however, the evil (namely, favorable treatment of mail order and "direct-to-you" establishments) anticipated by the wholesalers and the master plumbers was still a possibility. No one of the groups criticizing the original proposed Rule C-7 wished to eliminate entirely the differentiation on the basis of volume - witness the last sentence in the amendment offered by the master plumbers, quoted above. No matter what class the mail order houses were placed in, if the individual manufacturers were alloed to make their own discounts, the former might easily be given special consideration.

Distrust of the manufacturers' interest in trade differentials, as well as the fear of a general lowering of the discounts to master plumbers, led the NAMP to object to the reference to Schedules V and W in Rules D-2, D-3 and D-6. Schedules V and W were incomplete inasmuch as their reference to list prices and trade discounts, respectively, included merely a deferring of their establishment. The master plumbers asked that these Schedules be omitted from the code until it was possible for the manufacturers to propose price lists and discounts, which might be reviewed by the NAMP. The latter felt that the recent consumer list prices and plumber discounts published by the manufacturers had failed to allow the plumbers a fair margin of profit. (*)

The NAMP also objected to the maximum credit terms stated in Schedule W and joined the wholesalers in requesting a continuation of 2% 10th proximo instead of the two payment periods.

Finally the plumbers' association stressed the importance of the contracting branch of the industry with its estimated 25,000 members (the NAMP boasted of a representation of 15,000), the public health angle of the plumbing system, the need of conducting sales through the regular channels and the installation by registered plumbers, and deplored the entrance of the mail order and other forms of distribution into the field.

(d) The "Direct-to-You" Houses.

The National Plumbing and Heating Material Supply Association, representing "direct-to-you" concerns, came to the defense of Rule C-7, Customer Classification, as originally proposed by the manufacturers. Although in a telegram of August 25, 1933, Mr. Franz Nielson of that organization had filed objection to a proposed Rule C-7, the purport of the Association's brief of August 30 would indicate that the objection applied only to the substitute Rule C-7 proposed by the National Association of Master Plumbers. (**).

(*) Ibid., pp. 106 - 107.
(**) Telegram of August 25 and Brief of National Plumbing and Heating Material Supply Association dated August 30, 1933, both to be found in Vol. A, Part III.

The D-T-U association contended that, "in the Master Plumbers' substitute for the manufacturers proposed rule C-7 there is no recognition of the economic position of the mail order house and the direct-to-you distributor," and took "exception to the entire master plumbers' memorandum on the subject of C-7, Classification of Customers", and wished to support "the provision for the classification of customers as appearing in the manufacturers' proposed code under rule C-7." The D-T-U association gave in defense of its position the following argument:

> "The direct-to-you house thru the maintenance of showrooms of large stocks, thru extensive advertising and the use of large numbers of competent and aggressive salesmen, has been largely responsible for the sales of plumbing supplies for replacement purposes. Prior to the advent of these channels of distribution almost all of the business in this industry was confined to installations in new construction work. The cause, thereof, was that the plumber while expert in installation was and is not a merchandiser.
>
> "This morning the spokesman for the manufacturers stated that as a matter of fact consumers are able to buy more cheaply because of the mail order and direct to you houses. Any improper classification that limits the direct to you and mail order houses and creates an added burden in the cost of distribution which must be borne by the consumer will directly harm the purchasing public." (*)

Another brief of the National Plumbing & Heating Materials Supply Association included estimates of the amount of business being done by chain organizations such as the "direct-to-you" and mail order houses, and reproduced the statement of the President of the Burlington Brass Works to the effect that in recent years at meetings of manufacturers, opinions expressed as to the proportion distributed through these outlets ranged from 5% to 33-1/3%. The one source of information on the subject, where comparatively accurate statistics had been gathered, was not willing to divulge such information. (**)

While taking a favorable position toward the original Rule C-7, the F.P. & H.M.S.A. (D-T-U organization) opposed Rule D-4, Published Lists, if this was intended to permit different discounts for different classes or sub-classes of purchasers. The Association felt that "direct-to-you's" should be entitled to the same discounts as wholesalers since they performed the same functions as the latter except for sales to retailers. It also requested an opportunity to examine and comment on Schedule W before the adoption of Rule D-3, Terms and Discounts. (***)

(*) Brief of August 30, 1933, pp. 3-4 Vol. A, Part III, also Transcript of Aug. 30 Hearing, pp. 112-116.

(**) Brief of Sept. 9, 1933, Vol, B, Part I.

(***) Brief of Aug. 30, p.2, Trans. of Hearing, pp.112-113. Note: The last statement as it appeared in the brief mentioned Schedule V but this was because a revision in the proposed code effected during the hearing changed the lettering making Schedule W, Schedule V.

(e) The mail order houses

In a letter of August 28, 1933, to the NRA, the Mail Order Association of America took exception to the following provisions in the original draft of the Plumbing Fixtures Code:

Rule B-1 - Discrimination
Rule B-3 - Post-Dating and Pre-Dating
Rule B-9 - Substitution
Rule B-12 - Protection
Rule C-1 - Orders
Rule C-2 - Invoices
Rule C-4 - Grading (last 2 lines)
Rule C-6 - Consigned Stocks
Rule C-7 - Classification of Customers

Group D - Costs and Prices (the entire group)

In a brief dated August 30, 1933, and appearing in the collection of briefs compiled in the Appendix to the August 30th transcript of hearing, the Mail Order Association gave in more detail the reasons for objecting to the particular provisions.* Rule B-1 prohibited discrimination "in prices, terms, discounts, allowances, guarantees, or in any other way between purchasers of the same class or sub-class." To this the mail order houses suggested the addition of a clause securing to each manufacturer the right to select his own customers in bona fide transactions or to establish his own sub-classes, for fear the original prohibition would work to the disadvantage of the manufacturer's mail order customers.

The effect of Rule B-1, when seen in conjunction with Rule C-7, Classification of Customers, was such as to cause alarm to the mail order houses. In the opinion of the latter, the two together constituted an attempt "to establish selling prices without regard to the type or cost of service required." For example, one retailer might require more service than another, and the same might apply to a mail order house or to a wholesaler. One distributor might take goods in off seasons, might help finance the small manufacturer during slack seasons; while another concern in the same class might require the bulk or all of his goods during the height of the season, might not make prompt payments, might require small deliveries, etc. One wholesaler might use his own brands, do his own advertising, selling, and distributing; while another wholesaler might require the manufacturer's nationally advertised brands, circulars, sales helps, possibly the manufacturer's salesmen. There seemed no logical reason for selling the two distributors at the same price in spite of their being in the same classification, and the manufacturer should be allowed to classify them differently. Hence the Mail Order Association suggested a change in the last sentence of Rule C-7 substituting "a manufacturer" for "the association" as indicated by the underlined words in the following:

(*) Brief of August 30,1933. Appendix to Aug.30 Hearing, pp.4-13, Code Record Vol. III. The discussion of individual provisions is prefaced in the brief with description of the mail order house methods of operation, which has been reproduced in part in Section I of this Chapter.

"Any of the above classes may be further subdivided by a manufacturer on the basis of volume of purchases or any other valid distinction."*

In regard to Rule B-3, the Mail Order Association pointed out that it was the policy of its members to spread the work in manufacturing plants by buying goods during quiet or off seasons and in such cases it was customary to give datings. The deletion of this rule was recommended.

Under the conditions mentioned in respect to Rule B-3, Rule C-1, Orders, would also entail a handicap. The latter rule included the following sentences:

"...Only orders for stock for shipment within thirty days of date of receipt of order and orders for specific jobs will be accepted at the prices in effect at the date of receipt of order. All other orders shall be subject to the prices in effect at date of shipment..."

The Mail Order Association considered the rule "designed to handicap the small manufacturer as against the large, well-financed manufacturers, who can build up stocks and supply their trade from time to time as the demand required."**

Rules D-4, B-2 and C-2 met objection in common. D-4 provided for publication and filing of prices and all conditions of sale B-2 prohibited the "payment or allowance of secret rebates, refunds, credits... or the extension to certain purchasers of services or privileges not extended to all purchasers of the same class under like terms and conditions...." C-2 provided for the filing of copies of invoices, credit memoranda and all other sales documents with the Secretary as and when directed by the interested Association.

The Mail Order Association expressed strong antipathy to compulsory open price filing and all its trappings. It believed that whether or not a firm wished "to disclose its prices or terms to its competitors should be left to the judgment of those responsible for conducting the affairs of that firm, and the government should not insist that the efficient company open its records for the inspection of competitors." In the opinion of this organization there was nothing to "prevent any manufacturers who wish to do so from joining open price associations, but so long as a manufacturer or distributor does not sell below his cost, he should not be required to make public those confidential relationships that exist between the buyer and seller. Past experience has clearly demonstrated that such open price associations tend to raise prices and work a hardship on the smaller manufacturer."

(*) Ibid., pp.11-12

(**) Ibid., pp.9-10

To Rule D-1, Selling Below Cost, the Mail Order Association suggested the addition of a sentence reading as follows:

> "Manufacturers may allocate general expenses such as advertising, sales expense, bad debts, etc. to customers, according to services required to sell such customers."

The objection to Rule D-3, Terms of Sale, applied principally to the terminology used, although one change suggested was rather fundamental. For example, the manufacturers contemplated establishing manimum "terms, discounts (including trade discounts), allowances, and conditions of sale." The Mail Order Association suggested, for clarification, the following words in place of those just quoted: "collection terms, cash discounts, freight allowance and show-room discount." Thus one amendment amounted to making the provision more explicit, another to omitting "trade discounts" from the field of regulation.

The Association opposed Rule D-3, Resale Prices, for some of the same reasons it opposed Rule C-7 and B-1, namely, on the basis of comparative services involved in the various schemes of distribution. There was a feeling that resale price maintenance through the mail order houses would be quite impracticable, because most of the articles coming under the Plumbing Fixtures Code which they distributed were sold under the trade-name of the distributor.*

We get from the above discussion a rather clear idea of the mail order house philosophy toward the trade practice functions of a code. The Association opposed sales below cost either by manufacturer or distributor but felt that cost finding should give individual treatment with each purchaser in a separate class judged accoring to volume and services rendered. Customer classification was permissible but in effect was only possible of application if each customer was in a distinct class. In fact, a manufacturer should be allowed to give any customer any price he pleased, within the bounds of the costs of dealing with that customer, and should not be required to disclose either the price or the name of the customer to his competitors. Although opposed to all other "regimentation" the Association seemed to have no antipathy to mandatory maximum cash and credit terms.

(b) Code Operation - Provisions Immediately Affecting Distribution.

A number of provisions in the proposed code and almost as many in the Code as finally approved for the plumbing fixtures industry in January, 1934, very directly affected the industry's channels of distribution. In fact, distribution of the products is such an important part of the industry's economy that practically all the code trade practice provisions may be said to affect distributors. This section, however, is concerned with those provisions which were designed to restrict seriously certain distributive channels, to favor one channel as against another, or to establish the price returns to the various distributive agencies. Again, almost all of the trade practice provisions appear through the life of the code to have had one or more of the above effects. For example, Article VIII, Section 1 of the approved code restricting stock orders, was diametrically opposed to the mail order method of purchasing and had as much effect as any of the other code provisions in bringing a code breakdown.

(*) . Ibid., pp. 13-14.

In this first section, however, the discussion will be limited to such subjects as: customer classification, resale price maintenance (and price fixing), differentials and trade discounts, restriction of sales to specific outlets, etc., prefaced with a general summary of the results of the precode negotiations.

1. Negotiations Leading to Approval of the Distributive Relations Provisions in the Plumbing Fixtures Code.

(a) The proposed means for restricting channels of distribution.

The record of negotiations following presentation of the proposed plumbing fixtures code on August 19, 1933, is extremely incomplete. What material there is indicates that most of the discussion and revision applied to the provisions which are the subject of this section.

The Joint Coordinating Committee of the five manufacturers' associations never explained publicly why it was thought desirable to present the particular code provisions which were offered to the NRA for approval. There was, in the Public Hearing of August 30, 1933, a short statement regarding distribution in the industry, but Mr. Kohler seems to have inserted this more for identifying the industry than for justifying the code provisions, although justification might have seemed necessary in view of the objections already raised by individual industry members.*

The provisions in the proposed code of July 25, 1933, which are included in the discussion of restrictions on distribution, are the following:

Rule C-7 - Classification of Customers
Rule D-2 - Minimum Prices
Rule I-3 - Terms of Sale
Rule I-6 - Resale Prices
Schedule V- List Prices
Schedule W- Terms, Discounts, Allowances
Schedule X- Resale Prices

Rule C-7, as already described in a previous section, provided for classification of customers as either wholesalers, contractors, mail order houses and direct-to-you houses, retailers, or consumers. Deviation from such a classification in the quotation of price terms constituted unfair competition. The prerequisites for a wholesaler included: substantial and proper investment in his business, buying in bulk, maintaining warehouse and complete enough stock "to meet all normal requirements", making major sales to contractors and others who purchase for resale, maintaining office, sales and delivery service, not performing the functions of a plumbing contractor.

(*) For Kohler statement on channels of distribution see Transcript of August 30, 1933 Hearing, pp.22-24

The proposed code further provided that a plumbing contractor must be licensed, where required by ordinance, and is one who "installs plumbing supplies which he sells to the consumer." For code purposes federal, state and local governments were classed as contractors.

The definition of a mail order house was very similar to that of a wholesaler except that in place of the qualifications of major sales to contractors and others for resale, and the maintenance of office, sales and delivery service there was substituted the qualification of major business selling to consumers by mail. The "direct-to-you" house was similarly defined, and in place of the preceding qualifications was required to maintain an adequate showroom and its major business must be selling to the consumer from stores.

Rule D-2 and Schedules V and W must be considered together. The former prohibited a manufacturer from selling "his products (except on close-outs) below the prices established from time to time for different classes of customers and manufacturers and approved by the President." Schedule V was designed to provide the list prices and Schedule W the mandatory trade discounts. The determination of both sets of prices was deferred when the code was originally presented to the NRA. The rule and both schedules were to be "construed in the light of, and be subject to, Rule D-1" which provided for cost-finding.

Rule D-3 provided not only terms of sale but also, in conjunction with Schedule W, mandatory trade discounts. As indicated above, the actual discounts had not been determined.

Rule D-3 made it "unfair competition for any manufacturer to permit, where ... within his power to prevent it, the resale of his products to consumers at prices less than his established resale prices or less than those established from time to time pursuant to NIRA." In no event should the resale price be less than the minimum prices appearing in Schedule V, but the currently approved minimum resale prices would be shown in Schedule X (where their determination again was deferred).*

The above provisions, coupled with cost finding and price filing, as proposed in the original edition, indicate the seriousness with which code proponents viewed the industry price demoralization. Whether it was thought that all the provisions were necessary in order to effect a cure, or whether it was expected that not all of the provisions would meet final approval, is not indicated in the record.

(b) Reconstruction of the objections to these provisions.

As indicated earlier, the largest number of individual industry member objections filed applied to Rule D-2, for which the score was 12 (not including the Pacific Coast group of 10). A representative expression of the view of the individual companies is that of Mr. Carbeau of the Elwood Foundry and Machine Co. in a letter of August 21, 1933 to the Cast Iron Enamel Ware Association **

(*) See July 25 edition of proposed code for Plumbing Fixtures, presented to NRA on August 19, Vol. A.

(**) Elwood Foundry letter of August 21, 1933, Vol. A. Pt. III.

in which he contended that Rule D-2 was a price fixing agreement and that:

> "Such an agreement and such a provision is not at all necessary to effectuate the main purpose of the NIRA. The purpose of the act is to eliminate unfair competition. It is not intended to eliminate all competition which, in fact, would result from the adoption of Rule D-2 and Schedule V therein contemplated. It certainly would be a tendency toward monopoly and would be a discrimination tending to oppress small enterprises. This will be apparent when the small manufacturer, a few months hence, goes to his customer offering his goods at the same price and on the same terms and conditions as the larger manufacturer whose advertising program is and has been nation wide."

The Elwood Foundry and Machine Company favored price filing and cost finding, however, as did the large majority of the other companies. Price fixing was placed in another category altogether, although this distinction seems to have applied more to list prices than to discounts, for there were only five objections to Rule D-3. This seeming complete acceptance of the distribution features of the proposed code is all the more remarkable when seen in relation to wholesale defiance of these provisions during the life of the code.

The above discussion, although representative of the prevailing views of the industry membership toward the proposed code, does not adequately describe the position taken by the Pacific Coast manufacturers. The suggestions and criticisms of these members centered primarily in demand for territorial distinction (to be discussed in another section), but this was supplemented by demands for a more rigid classification of customers, for a practical application of the provision enabling fixing of discounts, for placing mail order houses in the retailer class, and for promoting sales effort on the part of wholesalers and master plumbers.

The wholesalers and the master plumbers were critical of the code because of what seemed to them a favoritism shown the mail order houses and "direct-to-you", They considered such distributors to be interlopers and to be classed as retailers. They also wanted very much to have a hand in the fixing of trade discounts, whenever that might take place, both because of the considerations frequently being granted the mail order houses and because they were afraid of a general lowering of the discount levels.

The "direct-to-you" concerns came to the defense of the original customer classification and were willing to have trade discounts fixed but were anxious to receive discounts as favorable as those accorded wholesalers.

Mail order houses opposed a group of provisions, all of which they considered designed to hinder the individual manufacturer's right to make his own choices, whether of customers or of prices and terms to be accorded such customers. The Mail Order Association did not oppose customer classification provided the individual had the right to define his own sub-classes. This association was as firmly opposed to price

filing as to price fixing but did not oppose cost finding nor the fixing of maximum cash terms (which provisions will be discussed in later sections). The following paragraph taken from a mail order brief is a useful summary of this position:

> "While the members of the objecting Association believe that merchandise should not be sold below cost yet they do not think that the selling price should be determined by any arbitrary regulation, but believe that the same should be determined by sound accounting principles and based or at least have some relation to actual cost of manufacture, distribution and service rendered. The rules and classes of said code which are objected to attempt to fix prices of the manufacturer to the retailer and of the retailer to the consumer and to restrict and hamper the relationship that should normally exist between the manufacturer and the retailer, and the retailer and the consumer."*

The following, then, were the parties at interest to the formulation of a Plumbing Fixtures Code: (a) the Joint Coordinating Committee of the five manufacturers' associations, (b) the large body of industry members who were not yet distinct as to size or methods of doing business or location, (c) the western group of manufacturers, (d) the Joint National Committee of Wholesalers, (e) the National Association of Master Plumbers, (f) the DTU association, (g) the Mail Order Association. Each took a vigorous and frequently a conflicting part in the pre-code negotiations over the group of provisions included in this section; for each of them had its own conception of what was, in terms of the Mail Order Association, "the relationship that should normally exist" between manufacturers, distributors and consumers.

(c) Selected phases of the negotiations.

(1) The "reciprocal rule".

There is probably no more interesting phase of the negotiations between the public hearing and final code approval, both because of its direct connection with the historical relationships in the industry as well as because of what it argued for successful code operation, than the attempt of the "legitimate" wholesalers and master plumbers to persuade the manufacturers' code committee to accept the so-called "reciprocal rule". This status had already been reached by the wholesalers and master plumbers in negotiations centering around their respective codes as is indicated by the following passage from an NAMP brief of September 11, 1933, filed in support of the Plumbing Contracting Proposed code:

> "With reference to the Wholesalers' Code we wish to state first that there have been many conferences between the Joint National Committee of Wholesale Plumbing Products and our Code Committee. The purpose of these conferences was principally to attempt to establish reciprocal rules between the Wholesalers and the Contractors in that, first, the Wholesalers would exclusively confine their sales to the Plumbing Contractors, and second, the Plumbing Contractors would exclusively confine their purchases to the Wholesalers. [illegible]

(*) Brief of Mail Order Association Aug. 30, 1933, p.6, Appendix to Transcript of Hearing of August 30, 1933, Vol.III.

Such reciprocal arrangements between the Wholesalers and Contractors would be especially advantageous. This plan would eliminate the increasing tendency of the Plumbing Contractor to shut the Wholesaler out of the line of distribution by purchasing direct from the manufacturer. This, the Plumbing Contractors have found necessary to do as a matter of self-defense and preservation in order to meet the increasing tendency on the part of wholesalers to sell plumbing products direct to the consuming public where they felt that such sales would not become known to the Master Plumbers. A reciprocal arrangement between the Wholesalers and Contractors would eliminate both of these unfair practices and would restore orderly distribution in the industry."*

The very fact that the wholesalers and master plumbers had made such an agreement was bound to affect manufacturers. Any manufacturers who depend on the retail market would have to find new distributors or go out of business. But the plumbers and wholesalers knew only too well that a portion of the sales (no one seems to have known how much) made by manufactureres was routed over an entirely different trail to consumers, namely, through mail order and "d-t-u" concerns. While it was desirable to have the manufactuers' acceptance of the "reciprocal rule" anyway, the presence of these other elements in the market made the manufacturers' cooperation in upholding the principle far more important.

Later sections concerned with a discussion of code operation will indicate to what extent the manufacturers acceded to the reciprocal rule proposition. Suffice it to say at this point there was a partial acceptance of the principle after many lengthy and bitter arguments between manufacturers and various groups of distributors, and after the appointment by the Administrator of a committee of three industrial advisers to reconcile the divergencies, and after a split in the ranks of the manufacturers' Joint Coordinating Committee. In the final vote on acceptance of the code, December 18, 1933, the previous unanimity of the latter committee was broken by the dissent of Henry Held of the Rundle Manufacturing Co., who had outstanding contracts with mail order houses.** The committee as a whole, however, was not in accord with the kind of air-tight reciprocity desired by the two groups of distributors, as will be indicated by the following passage from a letter of L. A. Cornelius, President of the Wolverine Brass Works, and an associate member of the Coordinating Committee, to Malcolm Pirnie, Assistant Deputy, on December 16, 1933:

"This letter centers upon the inclusion of the so-called reciprocal clause which appeared in the three codes of the industry as revised by the Coordinators and by them submitted to the manufacturers, Wholesalers and Retailers branches during the week of November 2 last.

(*) Brief of NAIP, pp. 5-6, Plumb. Contract., Vol. A.

(**) See Vol. II. NRA Files.

"Most of the time from November 2 until November 18 the Manufacturers' Code Committee, of which the writer is a member, met daily and nearly every night in a strenuous effort to again revise the original code and its subsequent revision (upon which many weeks of thoughtful effort had been spent), in order to coordinate as far as practically possible with the wholesale and retail codes.

"While many changes were thus effected, the so-called reciprocal clause was rejected unanimously and the concensus of the Manufacturers' Code Committee's judgment was embraced in the final voluntary code filed with you on or about November 17.

"The manufacturers fully concur in the wisdom and necessity of sanitary plumbing goods being furnished and installed by licensed and efficient Master Plumbers; they recognize the wholesaler's function and possible usefulness in the distributing system of staple material, but recognize, also, that new designs, new and improved systems and material have and probably will continue to be almost exclusively developed by the manufacturer; further, that the proper continuance and improvement of the industry largely depends upon the Master Plumber's acceptance of such changes. Therefore, there is the necessity in certain cases for the manufacturer to introduce and supply his special and individual lines and qualities direct to the Master Plumber -- to the one who installs, who must satisfy the consumer and who by definite experience and contacts can judge best the quality and results.

"It is pertinent to note that some of our most important and forward looking manufacturers who make quality material, have deemed it necessary to establish branches to present their goods direct to the Master Plumber instead of attempting to merchandise their output through the independent wholesaler.

"You inquired why my concern as a manufacturer could not distribute through the wholesaler; and, therefore, withdraw objections to the reciprocal clauses?

"The following, while not complete, gives sufficient reasons to prove that such change in our merchandising system would be confiscatory.

"The outlet through wholesalers is restricted. All too many wholesalers have had such hard going that they are dependent upon sources of supply and credit contacted in former years, which may carry them through this period and until their business is again profitable.

"There is the further elimination of the many wholesale branches of the Crane Company, the Standard Sanitary Manufacturing Company, and others who as manufacturers could not consistently buy our products.

"While we for these many years have been building the foundation of our sales by supplying the Master Plumber, there are many well known responsible manufacturers, such as the Kohler Company, Mueller Company, Speakman Company, Jajoca, Etc., who have very properly close working arrangements and so-called 'loyalty customers,' and such wholesalers could not be expected to transfer their good will to us.

"Our plant is not organized to manufacture for wholesalers. We make a large variety of special goods of high grade, many of them of unusual utility, and some of whichare not required in large quantities. To profitably supply most wholesalers, one should make a limited line of medium quality and produce in large volume.

It is our belief, based on many years' experience, that wholesalers could not sell our line unless they organized a sales force comparable to our own who possessed the ability and were given the training to sell on quality and lasting function, instead of first price."*

(2) Attitude of NRA Advisory Boards and Divisions

The position of the Industrial Advisory Board has been indicated in the preceding section. A committee of three industrial advisers was very active in an attempt to promote a better understanding between manufacturers, wholesalers and plumbers. On December 22, 1933, the Board gave its unconditional approval to the final draft of the same date.

Representatives of the Legal Division had opposed the air-tight "reciprocal rule" at one point in the proceedings,** but on December 22 the Division approved the final draft, containing provisions which may have seemed not quite so air-tight.

On December 18, Research and Planning submitted a report strongly criticizing the draft of October 16, 1933. The record seems to indicate that this Division was not asked to report on later editions. It is interesting to note further that no memorandum of Research and Planning was attached to Assistant Deputy Jacoby's report to the Administrator transmitting the final draft, although the objections raised in the December 18 memorandum applied with equal force to the final edition.

Mr. James Hughes, of Research and Planning, expressed himself as follows, in regard to the proposed provisions regulating distribution:

"The provisions of this section are definite attempts to freeze the channels of distribution after the products of this industry have left the hands of the manufacturers. It seems that this is an attempt to legislate beyond the scope of the industry and to dictate what the operations shall be under the wholesaling and retailing codes. If provisions such as this are allowed in codes generally it would soon freeze our method of distribution so as to prohibit increased efficiency of distribution and lower prices to consumers."

(*) Wolverine Brass letter of Dec. 16, 1933 to Pirnie, Vol. B.

(**) Letter of Wolverine Brass - passage not reproduced in preceding section.

A memorandum of the Consumers Advisory Board, of December 22, expressed views in substantial agreement with the above, and went into somewhat more detail. Assistant Deputy Jacoby spent the greater part of his memorandum to the Administrator, of the same date, answering these charges one by one; but as it turned out, there was no better forecast of the Code's failure than the very points raised in this Consumers' Advisory Board Memorandum. Because the criticisms related to the code as approved on January 13, 1934, they will be reproduced in the discussion, to follow, on the operation of the code.

Result of pre-code negotiations.

The first of the original proposals to be dropped in the period between the public hearing of August 30, 1933 and January 13, 1934 was rule D-2, Minimum Prices, which was eliminated immediately after the hearing. At the same time the part of Rule D-6, Resale Prices, which referred to price fixing by the industry was also eliminated, although a manufacturer was still prohibited from permitting, "where ... within his power to prevent it, the resale of his products to consumers at prices less than his established resale prices." Schedule X was dropped along with Schedule V.*

The last industry proposal to receive NRA approval was Section 7 of Article VIII which incorporated the remaining parts of Rules C-7, Customer Classification; D-3, Trade Discounts; and D-6, Resale Prices. Section 7 of Article VIII was subjected to further revision even after the official approval date of the code as a whole (January 13, 1934) and changes in the section were recorded in Amendment No. 1 approved January 31, 1934.

(*) See copy of proposed code, in Vol. A, identified by penciled notation, "First rewrite". This draft is undated but was written in the early part of September 1933. In the Public Hearing itself the manufacturers committee eliminated Schedules V and X although the record is not clear on what happened to Rules D-2 and D-6. See Transcript of August 30, 1933, Hearing pp. 118-119.

2. Customer Classification

(a) The approved code provision, Article VIII, Section 7.

We have taken note, in the preceding section of the report, of a revision which took place in Article VIII, Section 7, immediately after the code's approval. This was the result of a stay placed on the provision in the original Administrative Order of Approval, ostensibly for the purpose of receiving the proposal for determination and enforcement of a wholesaler-retailer differential. But when on January 31, 1934, Amendment No. 1 was approved, there was no change in the plan for a differential but rather a change in the definition of a wholesaler. The new version, by defining the "wholesaling function" rather than the "wholesaler" was intended to switch mail order and d-t-u concerns form the retailing class into the wholesaling class.*

The second paragraph of Section 7 before revision, defined the wholesaler as one who assembled, warehoused, and sold in bulk the "accessory and complementary products" of this and other industries and who bought in wholesale quantities. As revised, this paragraph lumped in one class all who performed the "wholesaling functions such as assembling, warehousing, and buying in bulk of these products and of accessory and complementary products by individuals, firms, or corporations either exclusively or in conjunction with the performance of the function of retailing."

With this introduction we pass on to a description of customer classification as provided in the code, although it is hardly possible to treat this subject separately. In fact, the class distinctions were merely an instrumentation for applying the differential, discount and sales restriction provisions.

Customer classification in the Plumbing Fixtures Industry Code was contained altogether in Section 7 of Article VIII, although other code provisions directly affected the classification. The opening statement of Section 7 pronounced that:

> "The functions of manufacturing, wholesaling, and retailing the products of these industries each constitute a separate business."

The paragraph which followed attempted to define wholesaling, retailing, and by implication, consuming, and outlined a plan for enforcing the distinctions. As revised, wholesaling included "assembling, warehousing, and buying in bulk" the products of the industry and accessories. Even when performing retailing functions, individuals might

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* The record is very incomplete on the subject of Amendment No. 1. Assistant Deputy Pilkington, in his Code History of the Plumbing Fixtures Industry, p. 15 f, intimated that the mail order houses applied the pressure which resulted in the stay and the revision; but this seems no more probable than that the stay was the result of a combination of considerations including advisory borad objections, mail order objections, the Rundle dissent to final approval of the code, and a general NRA feeling of hesitation in approving restrictive distribution provisions against substantial opposition.

be included in the wholesaling class. The second paragraph of the section named further qualifications for membership in the class: having a "proper investment in his business", maintaining "an adequate showroom, a warehouse, and sufficiently complete stock of such commodities to meet the normal plumbing supply requirements of his trade in his territory" and maintaining "an adequate bookkeeping system, sales office, and delivery service."

All others who purchased for resale were placed in the retailing class; and those who purchased for their own use, i.e., not for resale, were in the consuming class.

But the fifth paragraph of the section provided for another class entirely, and also for a division in the wholesaling class. The additional class was made up of manufacturers subject to the code, to apply to their purchases from other manufacturers subject to the code. The subclass included members of the wholesaling class who because of volume of purchases or other special considerations warranted individual treatment. The latter was the only group which the individual code member was allowed to define for himself and the inclusions in which were not subject to disapproval by the Code Authority.

In addition to mentioning the four classes of purchasers--manufacturers subject to the code, wholesalers and the sub-class special wholesalers, retailers, and consumers--the section directed every manufacturer to apply the classification to his own business. The seventh paragraph reads as follows:

> "Any manufacturer engaged in more than one level of the Plumbind Industry (manufacturing-wholesaling-retailing) shall conduct each business separately and with an individual system of accounting for each in accordance with the respective codes for the various levels of the Industry."

This, of course, applied to manufacturers' branch houses and was one of the signs of the reciprocity considered so desirable by organized wholesalers and master plumbers.

The means of enforcing the classifications was supplied in the sixth paragraph, reading as follows:

> "Each manufacturer shall file with the Code Authority, when required by it, but in confidence, the names of customers sold by him on each price level, his schedule of special discounts, and such other information as the Code Authority may require. If the Code Authority, after investigation, finds that any manufacturer has classified a customer contrary to the provisions of this Section, it shall so notify the manufacturer and require him thereafter to sell such customer on the proper level."

(b) Manufacturers

The subject of the classification of manufacturers came up as early as the code authority meeting of March 20, 1934, although to no immediate end except to schedule the matter for discussion at the next meeting, at
9825 which time Mr. Chase, Counsel for the Code Authority, was to report on

the matter.(*) At the next meeting, on April 3, 1934, Mr. Chase detailed the restrictions on sales between manufacturers subject to the code, but made no statement in regard to the classification itself, except that in his opinion Section 1 of Article VII, the standard clause prohibiting discrimination between purchasers of the same class, implied that all manufacturers subject to the code were in the same class. According to the Counsel, sales between manufacturers, when the purchaser was also a code member, were subject to the following code provisions: prohibition of sales below cost, price filing, regulation of stock and specific job orders, etc.; but were not subject to the provision naming the wholesale level plus 5% discount as the best price available under the code(**). The discussion resulted in issuance of a Code Authority Bulletin (No.16) on April 13, 1934, making the explanations public to the members of the industry.

Bulletin No. 16 went one step further, however, in distinguishing between manufacturers subject to the code and those not subject to the code, in the following language:

> "Manufacturers who are <u>not</u> subject to this Code, such as railway car builders, shipbuilders, etc., cannot be sold at better than your wholesale price level and they may be sold only on the basis to which their functions entitle them ....
>
> "<u>If they buy material for their own use, they are consumers</u>....
>
> "If they buy for resale, you may sell them <u>only</u> on <u>the retail purchase price level</u>, unless they perform <u>all</u> of the functions included in the definition of the wholesale level set forth in Section 7 of Article VIII.
>
> "If they do perform those functions, you may treat them as wholesalers. In that event file their names with the Code Authority .... as required by Bulletin #5."(***)

Manufacturers then might be found in all of the classes, which was very probably true before the code came along. But the novel regulations affecting sales between manufacturers must have meant, as is evident from the number of times the subject was discussed, a considerable re-shuffling on the part of some of the manufacturers; and the situation was further complicated by the fact that closely allied groups of manufacturers who had not been included in the code, at the last minute, were placed at a disadvantage.

In the Code Authority meeting of April 24, 1934, the subject came up again. This time an attempt was made to draw a distinction between

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(*) Code Authority Minutes of Meetings, 3/20/34, Code History, Exhibit C.

(**) Administration Member Report No. 2, Code History, Exh. D.

(***) Code Authority Bulletin No. 16, Code History, Exh. P.

sales to manufacturers subject to the code when the latter were in the same branch of the industry as the code members from whom they bought, and sales when the purchasers were buying parts from manufacturers in other branches in order to complete the assembly of products. An example of the former would be the sale of vitreous chinaware to a manufacturer of vitreous china; and example of the latter, the sale of brass fittings or trim to a manufacturer of vitreous china.

The Code Authority drafted a rule for distinguishing between these classes on the basis of the particular transaction involved. This rule, in effect, placed all sales between manufacturers subject to the code in the class of manufacturers' sales to wholesalers, except when the transaction was in a particular category which might be designated specifically from time to time by the Code Authority. The latter transactions were to be subject to all the provisions of the code, i.e., also to that provision giving manufacturers subject to the code a separate classification. The first three exceptions listed included the sales of tank trim to tank manufacturers, closet spuds to closet manufacturers, and closet seat hinges to closet seat manufacturers, all of which were sales of brass to vitreous china ware manufacturers. (*)

The Counsel for the Code Authority was sent to Washington with the rule and reported back at the next meeting on May 11, 1934, that nothing could be done about the matter without amending the code. (**)

(c) Wholesalers

In the meeting of February 28, 1934, the Code Authority first discussed the subject of classification of wholesalers and issued Bulletin No. 5 on March 3 calling for the filing of names of customers being sold on the wholesale purchase price level, the names of customers receiving special discounts, and the amounts of such discounts. (***)

Every Code Authority meeting following this one of February 28, 1934, recorded discussion of the wholesale classification, the important phases of which included the classification process as exercised by the Code Authority and associations, the willingness of industry members to file their lists of wholesalers, and the general effects of the procedure.

In the classification procedure, the call for wholesaler lists from code members was necessarily the first step. On March 20 the Code Authority decided to have composite lists of wholesalers made up from the lists sent in. At the same time the sources of the latter were to remain confidential. The composite lists, one for each of the four product branches of the industry, would then be checked through wholesalers and "direct-to-you" associations to indicate the "propriety" of their classification. (****)

(*) Code Authority Minutes 4/24/34, Code History, Exhibit C.

(**) Administration Member Report No. 6, Code History, Exhibit D.

(***) Code Authority Minutes of Meetings 2/28/34, Code History Exhibit C, Bulletin No. 5, Code History Exh. P.

(****) Administration Member Report No. 1, Code History, Exh. D.

The action taken at this last meeting raises three interesting points. In the first place, there was nothing in the code giving the Code Authority the right to make up composite lists and the very process would tend to make the findings depend less on whether the wholesalers qualified under the code definition and more on whether the manufacturers as a whole agreed that the concerns in question were wholesalers. In the second place, by checking through wholesalers' association membership lists, an unwarranted qualification was added to the code clauses themselves. In the third place, the Code Authority quite evidently understood that "direct-to-you" organizations were to be given wholesaler treatment under the code. The last point was verified by a direct statement a month later to the effect that these concerns if belonging to the recognized direct selling associations, "would be considered, for the time being, as meeting the code definition of 'wholesaler'"(*)

At the same meeting, April 24, progress was reported in the compilation of lists. No complete plan for dealing with the classification matter ever appears in the minutes of the meetings or in the Administration Member reports on the meetings, but it seems to have been understood that each association would elect a classification committee which would have the responsibility for this job. Something of the procedure attempted is indicated by the following passage from the minutes of the meeting of April 24:

> "The Secretary reported that the cards containing the names of Enamel Ware Wholesale customers were ready for the Classification Committee to start work, and that the Committee would commence going over them the following day.
>
> "It was agreed that customers who belong to any of the recognized wholesale associations or a recognized direct-to-you association, together with mail order houses, and those other customers on whose status all five associations agree, would be considered, for the time being, as meeting the code definition of 'wholesaler'. The doubtful cases would all be presented to the Code Authority for consideration. After the classification is completed, changes may be made from time to time, as may be necessary. On the completion of the classification, the Secretary will write each company, informing it of the names of its customers whom it must discontinue selling as wholesalers."(**)

In the same meeting, two issues were raised which the Code Authority was never able completely to cope with. The seat manufacturers requested through their association that department stores be placed in the wholesaler class, on which the Code Authority ruled that the matter could be handled in the regular course of classifying, which was just getting under way. This simple request was the indication of a deep seated distinction, which became evident later, between the business methods of the seat manufacturers and those of the fixture manufacturers. The incidence of the difference rested on customer classification.

(*) Code Authority Minutes of Meetings 4/24/34, Item 23, Code History Exh. C.

(**) Ibid.

The second important issue was the status of manufacturers' branch houses. These were wholly owned manufacturers' sales and warehouse branches, which the code had evidently intended should be treated no better than independent wholesalers. The applicable clause in Section 7 of Article VIII, however, forced the manufacturer to conduct each level of his "business separately and with an individual system of accounting for each in accordance with the respective codes for the various levels of the Industry." This did not oblige the manufacturer to give his branch houses no better prices than to wholesalers, and by making the branches separate entities it left the latter to make their own prices to retailers until the Wholesale Code should be approved. The Code Authority considered it undesirable for manufacturers to be allowed to quote their branches at any other than the wholesale level, and hence at the meeting attempted covering the subject with the following rule:

> "Manufacturing wholesalers should not be permitted to buy at lower prices than other wholesalers simply because they are also manufacturers."

The counsel was sent to Washington to see if this covered the loophole, only to report back that nothing could be done without amending the code. It was impossible completely to classify the branch houses as wholesalers without such action. (*)

In a Code Authority meeting of June 15, 1934, the wholesaler lists were again referred to. The lists prepared by the classification committees of the pottery and enamelware association were examined and the Code Authority decided to give each manufacturer an opportunity to comment on any of the names of his wholesalers who were omitted. The committees were urged to expedite the matter so that the lists might be available by the time the wholesalers' code was approved, because the proposed code for the wholesalers contained classification provisions which continued where the manufacturers' code left off (as will be seen in a later section of this report) (*)

Before any of the composite lists were completed the question had arisen as to what to do with them. It was hoped that they could be distributed as mandatory lists and the Code Authority meeting of May 11, 1934, records a discussion of the subject by the Counsel and the Secretary of the Code Authority. As reported by the Administration Member, Major Clay:

> "Mr. Chase and Mr. Hanson discussed the matter of publishing the list of wholesalers which is now being compiled by the Classifications Committees of the various Trade Associations. This list must not assume the form of a 'black list.' It is merely the recommendation of this Committee and gives everyone buying on the wholesale level an opportunity to present his case for consideration in the event that his name is not on the wholesale list prepared by the Classification Committee. Mr. Hanson reported that Mr. Jacoby advised him that such a list could be published provided it was compiled in the form suggested above."(***)

(*) Ibid., Item 4.
(**) Administration Member Report No. 7, Code History, Exh. C.
(***)Administration Member Report No. 6, Code History, Exh. D.

The subject did not come up again until September 28, 1934, when there was a discussion of the list prepared by the range boiler committee. Apparently the subject had been referred to Washington since the last discussion and the Code Authority Secretary was anxious to know what disposition could be made of this list. The Assistant Deputy in charge of the code had changed. Now it was Pilkington, not Jacoby; and after some discussion with the former, who happened to be at the meeting, it was decided to refer the list to his office for a legal opinion. The fact that the names of their customers had been filed by individual manufacturers in confidence seemed to make the Code Authority hesitate. (*)

On October 2, the matter was placed before the Administration by the Secretary. At the same time the latter enclosed a copy of a bulletin which had been sent out to the industry, in which the Code Authority had attempted to define the term "adequate showroom" which appeared in the code definition of a wholesaler. (**)

Mr. Pilkington referred the matter to the Legal Division in a memorandum in which the following are the pertinent paragraphs:

> "My interpretation of the relevant provisions of the Code is that each member of the Industry shall file with the Code Authority a list of those concerns whom said member sells on the wholesale purchase price level and if the Code Authority finds, upon investigation, that any concern on this list is not entitled to buy the products of the Plumbing Fixtures Industry at the wholesale purchase price level, such name shall be striken from the list until it qualifies according to the provisions of the Plumbing Fixtures Code. To me, this means that each member of the Plumbing Fixtures Industry has the right to determine whether a concern is so qualified within the limits of the classification set up in the Code.
>
> "On the other hand, I see nothing in the Code permitting the Code Authority to compile a composite list of such qualified wholesale purchasers other than for their own reference, even though such a composite list would not divulge which wholesalers represent which members of the Industry, thereby violating confidence. A composite list made public would, however, in my opinion, promote the possibility of the establishment of a black list, and further have the effect of restraint of trade.
>
> "Your attention is also called to the Code Authority's definition of an adequate show room. While the Code may not provide for Administrative approval of a definition of the word "adequate", I, nevertheless, am of the belief that once again the Code Authority is exceeding its prerogative in so definitely establishing a definition of the word "adequate" and thereby extending Code provisions in that respect.

(*) Administration Member Report No. 11, Code History, Exh. D.

(**) Hanson letter to Pilkington, 10/2/34, Deputy Files.

An "adequate showroom" was deemed to include one each of a bathtub, lavatory, closet combination, kitchen sink, closet seat, range boiler, laundry tray, complete set of plumbers' brass for all fixtures.

"I believe this is a very important matter, as I understand that the other Divisions of the Industry are taking like action and will proceed in like manner toward the establishment of a composite list of approved wholesalers unless a definite ruling is issued by the Administration circumscribing the limits of the procedure." (*)

Later in the same month the Secretary presented the Code Authority with the final enamelware and pottery lists and the latter voted to distribute these lists to the members of the respective industries, but the Administration Member pointed out that a reply from Mr. Pilkington on the range boiler list was still being awaited. (**) On December 11th still no word had been received from Washington, and the two lists were being combined, with the possibility that in the near future the list made up in the brass line would be merged also. There was no mention of either range boiler or sanitary seat lists. At the same meeting, however, a letter from E. L. Flentje of the Plumbing and Heating Contracting Divisional Code Authority was read, requesting lists of approved wholesalers. The manufacturers' code authority agreed to advise Mr. Flentje that no lists had been approved. (***) From the history of the plumbing industry it appears probable that the request for such lists by the master plumbers meant one or both of two things; first, a criticism of the classification of "direct-to-you" and mail order houses as wholesalers; second, an attempt to boycott wholesalers not on the lists. To the latter possibility, Major Clay, Administration Member, had apparently given some thought, for in his report of the next meeting, January 16, 1935, he posed the question (to the Assistant Deputy): "Would it be good policy to secure the cooperation of the Master Plumbers Association?" (****)

One wholesalers' association had already registered its bitter disappointment at the classifications allowed "d-t-u" and mail order concerns by the code and given them by individual manufacturers, and there is no doubt that in doing so the New York State Association of Wholesalers of Plumbing and Heating Supplies was expressing the sentiments of the plumbing contractors as well as of the other "regular" wholesalers associations. This letter was sent to all the manufacturers by the Plumbing Fixtures Code Authority along with the bulletin of August 3, 1934, and several paragraphs of it bear reproduction here as follows:

"We deny that the word 'Wholesaler' can be interpreted to include a person, firm or corporation having only one retail customer and having thousands of consumer customers.

"We deny that a mail order house can be fairly classified as a wholesaler just to enable purchase at the wholesale level for the purpose of getting merchandise to several hundred self-owned retail stores at much below any other retailer's cost and for the purpose

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(*) Pilkington memorandum to W. W. Swift 10/6/34, Deputy Files.

(**) Ibid. No. 12.

(***) Ibid. No. 13.

(****) Ibid. No. 14.

of assembling in three or four mail-order-houses warehouses merchandise, not to be sold to retailers, but to consumers.

"We deny that any so-called "direct-to-you firms" classifying itself as such, can be fairly classified by some other authority as a wholesaler when the self-styled "direct-to-you" entity, by thus styling its own functions, so clearly indicates, negatively, that the firm is not in the wholesale business.

"Some measure must be found by some one in authority for determining, amongst other things, how many retail customers (not consuming customers) are served by a wholesaler to represent the current performance of a wholesale function. Until there is a differentiation between the wholesaler and the big retailer we will suffer from an oppression of small enterprises and from a definite rapid trend toward monopoly in the distribution of staple plumbing fixtures." (*)

Complaints against the customer classification procedure and code provisions came from manufacturers also, and may be placed in three categories. In the first place, there were the manufacturers who refused to file the names of customers who would come in the sub-class of wholesalers to receive special discount. These may not be considered strictly as complainants, because, as a matter of fact, complaints were filed against them, as we shall see below in the discussion of mail order house contracts. Nevertheless, their refusal implied a judgment of the code provision. In the second place, there were those industry members whose wholesale customers could not stand the scrutiny of the association classification committee. The following excerpt from a letter of the Commercial Enameling Company of Los Angeles to the Administration Member needs no interpretation:

"We were forced to discontinue selling practically all our customers, in order to live up to the provisions of the Code. This, because these customers did not qualify as wholesalers. We have bravely dropped these customers and now find ourselves with such a narrowed outlet for our ware, that it becomes serious for us.

"I have spent forty years in the enameling business. Some six years ago I started this concern. We went through the agony of being born, gave the concern the hardest work of my life, put up no end of sacrifice and did a lot of patient waiting; and we have provided, in our small way, a means of livelihood for some twenty people.

"In addition to this, it took money to introduce our line and we have arrived at a time where our ware is recognized and we did have a line of customers to give us volume commensurate with our plant. We want to do our bit, although as conditions now exist, our opportunities to do our bit have practically ceased.

(*) Higinbotham letter of 7/18/34 to P.F. Code Authority with C. A. Bulletin of 8/3/34, Code History Exh. P.

"Our old customers who have been cut off cannot understand why they cannot continue to buy from us, same as heretofore. They say we have been selling them for years, they paid for what they bought and have the money to pay for what they want to buy from us now - and seemingly they have stock from some one else." (*)

There were other manufacturers who complained of the same effects in letters in reply to the Pilkington questionnaire.

In the third place, there were manufacturers who disliked filing their lists of wholesalers for fear of making a present of the wholesalers to their competitors. The Public Service Brass Co., for example, wrote the NRA as early as March 9, 1934, taking exception to the procedure required under the code. In effect, the company stated:

"We have no objective to furnishing price sheets but we do most emphatically protest against our being compelled to furnish a list of our customers to our competitors for this is information that is sacred to our organization and we feel that it is asking too much to compel us to make this sacrifice, for it will mean a tremendous loss to us, if not actually closing our plant, and while I make personal reference, however, we are confident that we are expressing the thought of practically all like manufacturers." (**)

When in December, 1934, the Administration issued an interpretation qualifying the filing agent, mentioned in Article VIII, Section 7, Paragraph 6, as the recipient of lists of customers and special discounts, calling such an agent a confidential agent ("a representative of the Code Authority who shall not be in the employ of any employer under the Plumbing Fixtures Code"), it expected to be in a position to answer criticisms similar to the one made by Public Service Brass. (***) But the latter company pointed out in its letter of August 15, 1934, that "confidence in this subject required not so much refusal to disclose the manufacturer's name but refusal to publish to the industry a list of prospective customers". (****)

The general effects of the wholesale classification cannot be fully appreciated until we have discussed the price provisions of the code. It can be seen already that trouble arose over the provision itself and the way it operated. One whole division of the industry wanted to classify as wholesalers, department stores (and later retail hardware stores also), although these could not have qualified under the code provision. Some of the smaller companies were literally being classified out of existence because of the association classification committee's power of review. Other companies were in danger of losing their customers, even if they qualified, whenever the composite lists should be exposed. But still

(*) Letter from Commercial Enameling Co. to W. L. Clay, 7/2/34, Deputy Files.
(**) Public Service Brass Letter to Administrator 3/9/34 Deputy Files.
(***) Administrative Order No. 204-21, Dec. 3, 1934, Deputy Files.
(****) Public Service Brass Letter of 8/15/34, op. cit.

greater troubles were arising through the combination of price and classification provisions.

(d) Mail Order Houses

As indicated above in the section on "Wholesalers", the mail order houses were early classified as wholesalers under the code. (*) This action was a far less controversial subject, however, than the question of what price return was to be accorded these concerns in the general class of wholesalers. If the recipients of the 5% differential, i.e., the members of the favored sub-class of wholesalers, had been called "super-jobbers", the mail order houses, based on their probable or suspected price terms, were worthy of the designation "super-super-jobbers". Although this is partly a story of classification, it can be told more accurately in three further sections of the report, namely, on the 5% differential, on price filing, and on the limitations on stock orders.

(e) Retailers

The Plumbing Fixtures Code classed as retailers all who were not wholesalers and who purchased for resale. (**) There was not a great deal of recorded experience with this clause. The predominating desire of distributors was to qualify as wholesalers, and hence there was less dispute over the retail classification. Large industrial and real estate concerns had before the code bought in some quantities direct from the manufacturer and probably ranked somewhere between wholesalers and retailers. The code provision that caused them the most damage, however, was the one prohibiting sales to consumers, and this will be discussed in a later section.

The Code Authority never required the filing of lists of retail customers, the assumption being, possibly, that the "resale" limitation was easily enough enforced. The "resale" qualification certainly entailed little interpretation, but there is no doubt that it proved to be a considerable hardship, with wide enough effects to make any real enforcement dubious.

The one positive act of classification performed by the Code Authority in regard to retailers was to place "group purchasing agents" in this class. (***) These agents were not defined, but in the meeting of March 3, a bulletin, issued, it was thought by a group of purchasing agents, was read to the Code Authority. The bulletin, in effect, offered aid to jobbers who wished to get around code difficulties, particularly as to quantity discounts. There was discussion of the matter at the meeting and a call for investigation but no further action. (****)

(*) See II B 2 (c) "Wholesalers", for action taken by Code Authority in this respect, March 20 and April 24, 1934.
(**) Plumbing Fixtures Code, Art. VIII, Sec. 7, Par. 4.
(***) Code Authority Minutes of Meetings 3/6/34, Code Hsitory, Exh. C.
(****) Admin. Member Report No. 2, Code History, Exh. D.

(f) Consumers

The subject of classification of consumers is again one that can better be discussed in another section, one on restrictions on sales to classes of buyers. The code prohibited manufacturers' sales to anyone who did not resell the products. The actual classifying of consumers by itself amounted to no more than confirming the purpose of the code provision. For example, on March 3, 1934, the Code Authority agreed that ship lines, railroads, hospitals, asylums, office buildings, etc. were all consumers (and hence could not be sold direct). (*)

(*) Administration Member Report No. 2, Code History, Exh. D.

Summary

In general customer classification in this industry's code was an active process. The Code Authority and classification committees actually attempted to classify customers. There is no doubt that the classifications were restrictive, but the outstanding conclusion to be drawn is that in the plumbing fixture industry at that time any attempt to establish a uniform scheme of classification was bound to be extremely restrictive and was also bound to fail. There was too many uncertain quantities in the industry and methods of distribution were changing too rapidly to permit of classifying the channels in use.

3. Distribution Differentials and Trade Discounts. (*)

The approved Plumbing Fixtures Code contained two provisions directly affecting trade differentials. One specified the nature of the discount based upon the quantity purchased; this is discussed in the subsection on Quantity Discounts. The other provision, permitted the Code Authority to establish a minimum wholesaler-retailer differential. This read in part as follows:

> "In recognition of the fact that the products of these industries cannot be installed in ultimate service without the performance of wholesaling functions such as assembling, warehousing, and buying in bulk . . . individuals, firms, corporations, or other persons, performing such wholesaling function and purchasing in wholesale quantities, shall receive a trade discount from published prices greater than the trade discount accorded to any individuals . . . who do not perform the wholesaling function hereinabove described. The difference between the trade discount allowed to those individuals . . . performing such wholesaling function and the trade discount accorded to other purchasers for resale, shall be determined by each individual manufacturer in establishing his wholesale purchase price level and his retail purchase price level; but in no case shall the difference be less than the percentage determined by the Code Authority, with the approval of the Administrator,, subject to modification made therein from time to time with the approval of the Administrator, such percentage and such modifications therein to be confirmed by immediate studies of the value to the consumer of the functions involved. Such studies shall be made by an impartial fact finding agency under the direction of the Code Authority," (**)

(*) Minutes of the Code Authority Meetings, and Administration Member's Reports are respectively Exhibits C and D of the Code History. All other material bearing on Differentials is in the Deputy's Files.

(**) Paragraph 2, Art. VIII, Section 7, revised in Amendment 1, January 31, 1934.

The code originally proposed contained various restrictive devices, including minimum prices, resale price maintenance, mandatory discounts, etc. The above quoted provision was the remnant of the more elaborate industry attempt to regulate the competitive situation through price control; and this clause, after proposal, was continuously disapproved by both the Consumers' Advisory Board, and the Division of Research and Planning.

The entire industry, manufacturing and distributing, was split into two factions on this subject. It was again a case of the firmly entrenched enterprisers seeking means of retaining their advantages of being the traditional channels of distribution; and the newcomers seeking to prevent the freezing of distribution into only the existing channels. (*)

At the February 15, 1934, meeting of the Code Authority, the accounting company of Ernst and Ernst was authorized to make a preliminary study of distribution costs in the industry. Based upon their findings, it was decided at the February 28, 1934 meeting, that 20% should be the minimum mark-up over the wholesale purchase level. The NRA was informed of the industry's drive for a 20% differential and was urged to hasten approval of the marking in order to effectuate the price filing system and the distinction between the two levels of distribution. Furthermore, the proponents were very anxious that the minimum differential be written into the manufacturing code at the same time that the wholesale code was approved, since any lag in the application of the differential to different types of vendors must result in competitive advantage to one. (**)

On July 24, 1934, a public hearing to consider the proposed differential of 20% was held. At this time the master plumbers indicated they had no objection to the 20% differential; that on the contrary, they considered it reasonable. The Central Supply Association, on the other hand, representing 325 plumbing wholesalers, submitted average figures on sales, gross margins and operating expenses for 1930 as proof that 25% mark-up was necessary. The Association also claimed that a differential as low as 20% would force wholesalers to meet on many commodities the quoted prices of manufacturers who sold direct to the plumbers. (***)

The Mail Order Association of America objected to the establishment of any differential on the grounds that in operation such provisions resulted in price fixing. The Association was particularly opposed to the figure proposed by the plumbing manufacturers because it was an average, and advocated prices based on each actual transaction, pointing out

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(*) For a fuller treatment see above, the subsection on Customer Classification.

(**) See minutes of the Code Authority meetings of March 20, April 3, June 15, 1934, Exhibit C and Exhibit D of the Code History for the Plumbing Fixtures Industry.

(***) Statement of E. L. Flentje, member of Division Code Authority of the Plumbing Contracting Division of the Construction Industry at the July 24, 1934 hearing.

that its members sold a limited number of standard styles, concentrating on volume, thus affording the manufacturer the savings accruing from mass production, and moreover, that the dollar volume of retail sales handled by a mail order house was larger than that handled by most retailers. (*)

In a letter dated September 14, 1934, from Secretary Hanson of the Code Authority, to Assistant Deputy Pilkington, the Advisability of declaring an emergency in the industry was discussed. The code had no such provision, and would have required amendment; instead Mr. Hanson urged action on the differential and the cost accounting system. (**)

No differential had been approved at the time the trade practice provisions of the Plumbing Fixtures Code were deleted by Amendment No. 3 on March 25, 1935. In addition to the usual delays attendant upon putting into effect a code " enabling" provision, the proposal for a differential met a definite change in NRA policy in Office Memorandum No. 267 issued on June 8, 1934, which declared, in effect, that no proposed customer classification clauses with any fixed differential would receive NRA approval. From the time of the hearing on to March 25, 1935, the position of almost all the advisory boards and divisions was in definite opposition to the differential and the Administration was very hesitant about attempting to push it. Objections to the adequacy of the evidence offered in support of the differential were joined with the objections on grounds of policy. The opinion of Research and Planning, as expressed in a memorandum from R.D. Winsted to Assistant Deputy Pilkington on August 1, 1934 exemplifies this opposition and is reproduced below:

> "It is not believed that approval of the proposed differential can be properly considered at this time despite the lifting of the stay and the revision of Section 7, Article VIII, of the above Code on January 13, 1934 and January 31, 1934. Office Memorandum No. 267 states that the policy against the use of stipulated prices, discounts or differentials for classes of customers should be substantially followed " wherever provisions for classification of customers are included in Codes."
>
> "Aside from such policy considerations the following facts were developed at the Hearing and Conference on July 24, 1934:
>
> "The data submitted as the study which was to be made by the independent agency cited in Section 7, Article VIII of the Code, was a presentation by a representative of Ernst and Ernst of summary data compiled in 1930 by the Bureau of Research, Harvard University, of material supplied from 203 wholesaling firms by the Central Supply Association, an organization of wholesale plumbing firms. The

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(*) See brief of the Mail Order Association of America presented at the July 24, 1934 Public Hearing.

(**) Code Authority meeting of September 25, 1934.

representative of Ernst and Ernst who made the study stated that he had not seen nor examined the individual reports submitted by the 203 wholesaling firms, nor had any rechecking or reanalysis of the basic data been undertaken.

" The sample of 203 firms out of the approximate 2000 wholesale plumbing firms in the industry is too small a sample to give any reliable data. No checking report of any kind was submitted in support of the Harvard summary figures.

"The data for the year 1930 showed about 4 per cent higher costs of operation of wholesale houses than for any previous year. The point advanced that 1930 volume was closer to average volume than any other year which the Harvard data covers may be given weight, but it is well known that during 1930 overhead and operating costs were overloaded due to efforts at carrying executive, sales and office personnel in the face of declining volume. In 1931 these overhead costs were cut drastically. This point is clearly shown on page 25 of the Transcript of the Hearings wherein the Central Supply Association states: "Wholesalers have made drastic reductions in operating expenses during the past two and a half years. Executive salaries and expenses have been cut to the bone.

" Despite these well known factors, the representative of Ernst and Ernst stated that no consideration had been given to the possibility that operating costs for 1930 were not typical of present day costs and that no study had been made to show whether there was any similarity between present costs and those in 1930. Obviously the high costs revealed for 1930 by the Harvard summary cannot be taken as indicative of costs since 1931.

"The data submitted in support of a differential was based on a summary study of interquartile operating expenses of the total 203 firms summarized by the Harvard study. The number of firms in this interquartile group was not definitely given but was mentioned as about 100. However, after submission of this data, which, in the letter to Kohler of March 2, 1934, indicated a 20 per cent minimum differential, the Code Authority ordered the lower quartile data to be used in making the application. This was claimed also to show justification for a 20% minimum differential. However, no statistical breakdown of the lower quartile figures were given; hence the basis for the application that was finally made does not appear in the record and has not been examined. No information is given as to how many firms are represented in this lower quartile data, but presumably it is in the neighborhood of fifty.

" In none of the material submitted by Ernst and Ernst has there been shown any itemization of the elements incorporated in arriving at the operating expenses. It is stated in the letter of March 2 to Mr. Kohler that ware-

house occupancy, delivery service and executive expense represents " about" 7-1/2 per cent of the 25 per cent to gross sales covering total costs of doing business. 'The balance of the cost of doing business percentage' is said to 'represent selling, office expense, provision for credit losses, allowances, etc.', this statement being the only information given.

"It is intimated in the letter to Mr. Jacoby of March 16, 1934 that the lower quartile figures show somewhat lower percentage costs for warehouse occupancy, delivery service and executive expense though these figures are not definitely shown except by computation. In fact it appears that the establishment of all the lower quartile data, together with the recommendation for a 20 per cent differential based on this data, was arrived at as a result of computation rather than factual study.

"In short it appears, from the methods used by Ernst and Ernst, that the data from the entire 203 firms indicated a 20 per cent differential to that firm. A second computation based on interquartile data also indicated a 20 per cent differential. Then to cap the climax the computation of lower quartile data is also claimed to justify a 20 per cent differential. Statistically such claims are insupportable.

"It was acknowledged that no study was made of costs of large volume direct shipments from manufacturers to contractors or other consumers, which would be the transactions largely affected by the differential.

"Since the individual reports on which the Harvard data were based were not examined, no data as to ranges in operating costs in either the lower quartile data finally decided upon as a proper base or ranges in the interquartile data originally decided upon as a base were known to Ernst and Ernst representatives, nor are they available for study.

" Obviously the ranges between high and low operating costs in any statistical group, particularly in a small sample, are essential in determing so important a question as a minimum differential.

" It was further brought out at the Conference that the data published as the Harvard study was compiled by the Central Supply Association and forwarded to Harvard for checking and publication under its authoritative name. It would appear, therefore, that such a study can be questioned as to its independence and as to whether any independent study of any kind has been made in this presenta tion, as required under the Code provisions.

"Because of the above inadequacies of data, inadequacies of method of study and the inconclusive nature of the presentation, this Division can see no justification for believing that any case has been made for any specific differential.

"It is, therefore, recommended that the application for the differential be disapproved on the two counts that the differentials are contrary to policy, and that no material has been presented to justify the differential applied for." (*)

The discussion of the subject of differentials naturally centers around the code provision which has been treated above. There were several other aspects, however, which occupied important positions in industry discussion. One was the matter of maintaining separate levels. The code stated that there should be a wholesale purchase price level and a retail price level and a considerable amount of energy was spent by the Code Authority in attempting to keep them distinct. Furthermore, the Code Authority felt called on to indicate to whom producers might sell at each level. Since this action had to do largely with customer classification, it had been discussed in the preceding section.

From an interview with the representative of the Crane Company in Washington on January 10, 1936, it appears that the trade discount to plumbers had been lowered to 20% and less by the industry in the spring of 1934. The discounts to wholesalers had also declined. The reason for the changes lay partly in the fact that manufacturers were having to meet mail order competition on the ultimate consumer level and partly in a more general use by manufacturers of a distinction in price between fast and slow selling items. Of course, mail order houses specialized in the faster items, and hence the reductions upon these items may have been one aspect of mail order competition.

The first results were apparently a lowering of discounts on the staple or volume items from 25% to 20% for plumbers and from 30% to 25% for wholesalers. Later, however, the discounts were again reduced. Plumbers received 17½% on staple and 20% on other items, while wholesalers received 20% and 25%. At the same time manufacturers reduced their own net realizations, and hence the reduction in the consumers' list was considerable.

(*) Exhibit "N" of the Code History.

4. Quantity Discounts (*)

Neither the proposed nor the approved codes specified the use of quantity discount schedules. The approved code mentioned quantity in connection with the maximum differential discount. The question of quantity discount was directly involved in the Interpretation of the following section of the Code:

> "No manufacturer shall sell the products of these Industries to anyone except to manufacturers subject to this Code at better than his wholesaler purchase price level. Customers who qualify for such level may be further classified by each manufacturer on the basis of volume of purchases or on any other basis as specified in his published prices and other conditions of sale which he has filed with the Code Authority in accordance with Section 10 of this Article, but in no event shall the special discount exceed five (5) per cent beyond the net price for the wholesaler level.
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> "Each manufacurer shall file with the Code Authority, when required by it, but in confidence, the names of customers sold by him on each price level, his schedule of special discounts, and such other information as t e Code Authority may require." (**)

Preferential discounts are also discussed in the sub-sections on customer classification, and on mail order contracts.

At the February 28, 1934, Code Authority meeting it was voted to call for the filing of lists of customers being sold at the wholesale level, together with the discounts, if any, being granted them. There is no material as to the number of lists filed in response to this request. However, it is known that about four or five companies did refuse to file the names of their customers receiving special discounts and the amounts of these discounts. One, the Rundle Manufacturing Company, in a letter to the Code Authority dated March 6, 1934, refused to file the requested information until after the outcome of the general Code Authority meetings of March 5, 6 and 7 in Washington. The Code Authority's response was Code Authority Bulletin #7, which discussed and explained several provisions of the code, including the five per cent discount. It was announced that the list of customers receiving this

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(*) Sources: Code Authority Minutes of Meetings - Code History, Exhibit C Code Authority Bulletins, Code History, Exhibit P Administration Member Reports - Code History, Exhibit D All other correspondence on the subject may be found in the Deputy's Files.

(**) Paragraph 5, et. seq., Article VIII, Section 7

discount would be kept confidential by the Code Authority.

There was a conflict of interpretations concerning the five per cent discount. The Code Authority interpreted the above quoted section of Article VIII to mean that no manufacturer could grant any customer, classified as a wholesaler, a price which was more than five per cent less than the price quoted any other customer in the same classification, regardless of the differences in quantities purchased by both. This limit was not to apply to sales among manufacturers all bound by the code. (*)

The NRA issued an interpretation, saying that the code clause providing the special discount did not prohibit the manufacturer from having separate basic prices for stock orders and for specific job orders to each of which the five per cent applied. At its meeting, the Code Authority tentatively decided that a five per cent discount being given by some manufacturers on purchases of material for $50.00 or more did not interfere with the five per cent discount which by an earlier interpretation was to be kept confidential. Small manufacturers were complaining that the larger manufacturers had stopped giving them the five per cent spot discount, formerly granted them. The large manufacturers explained that the smaller ones were undermining the wholesale price level because these were granting some wholesalers a five per cent extra discount as wholesalers, and another extra five per cent for acting as manufacturer's agent.

The range boiler manufacturing industry attempted to solve the problem of the 5% discount by asking that the Code Authority prohibit the use of any preferential discounts for any member of this industry. The request was declared to be beyond the authority of the administrative body. It was decided that each member make a statement in his own price list covering the subject. (**)

As a result of this controversy, the May 15, 1934 Code Authority Bulletin, No. 21, was devoted entirely to the question of subterfuge concerning the use of the five per cent discount. This read in full, as follows:

"TO THE MEMBER OF THE INDUSTRY ADDRESSED:

"A manufacturer's basic wholesale level, according to an official N.R.A. interpretation of Section 7 of Article VIII of the Code, may consist of one price for stock orders and another price for specific job orders, both prices to be published, filed, distributed and adhered to as provided for in Section 10 of Article VIII. No division on any other

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(*) Administration Members Report #2, April 3, 1934.

(**) Administration Member Report #6, May 11, 1934, and Meeting of the Code Authority, for same date.

basis is authorized, however.

"The same section provides for special discounts beyond the base prices for the wholesale level of not exceeding 5%. No other special discount is permitted by the Code.

"These authorized special discounts up to 5% may be given for any reason whatsoever, but the basis on which they are given must be published to the customers to whom they are available and must be filed with the Code Authority. The Code Authority filing department will keep these special discounts confidential if they are published separately from the regular price lists, but in no event can there be a special discount which has not been filed with the Code Authority.

"If, however, you include on your published price list, in such a way that it cannot be kept confidential, any special discount, such as 5% for a given value of merchandise, you will none the less have used up the only special discount provided by the Code, and there can be nothing more beyond.

"WHERE A MANUFACTURER PAYS A CUSTOMER A WAREHOUSE FEE OR A COMMISSION AS A SALES AGENT, OR SOME OTHER SUCH SPECIAL COMPENSATION, THE CODE AUTHORITY WILL CONSIDER IT PRIMA FACIE EVIDENCE OF AN ILLEGAL SPECIAL DISCOUNT, AND PROCEEDINGS WILL BE INSTITUTED FOR VIOLATION OF ONE OR MORE OF THE FOLLOWING SECTIONS OF THE CODE:

"Article	VII,	Section 1 -	Discrimination
"	VII,	" 2 -	Secret Rebates
"	VIII,	" 1 -	Orders
"	" ,	" 2 -	Invoices
"	" ,	" 6 -	Consigned Stocks
"	" ,	" 7 -	Distribution
"	XI,	" 10 -	Published Lists"

This bulletin aroused some members of the trade, who demanded different rates for carload and L. C. L. shipments. The matter was put up to the NRA and reported by the Administration Member as follows:

"At this point there was a discussion of quantity discounts and the Secretary of the Code Authority was requested to write the Assistant Deputy Administrator for interpretation of the Code as now approved. The interpretation will pertain to Section 7 of Article VIII which states: 'but in no event shall the special discount exceed 5% beyond the net price for the wholesale level'. In other words, must manufacturers file one set of prices as their wholesale level for each particular item beyond which the maximum 5% discount only can be given; or can manufacturers file a set of prices for each item and quote various discounts for quantity, in addition to the special

> discount of 5% authorized by the Code. For example, suppose a manufacturer files a price with the Code Authority on a particular item and allows the discount of 35-5%. According to the Code, this manufacturer can grant the additional special discount of 5% on this particular item. However, assume that the manufacturer has a large contract for this and other items with a mail order house. Could this manufacturer then file his priced with the Code Authority on the following basis: 'For guaranteed annual purchases of $300,000 of these items, the following discounts will apply: 35-5-10%'. Certainly contracts for large tonnage or large volume are given greater consideration in ordinary business dealings than orders placed on a regular wholesale level. Since there is considerable difference of opinion on this subject, it is requested that careful consideration be given to the interpretation of the code on this particular matter when it is submitted by the Secretary of the Code Authority." (*)

Whether a quantity discount came under the 5% maximum discount continued to be argued. The question focused around the query raised by the Milwaukee Flush Valve Company in its letters to Code Authority Secretary, R. H. Hanson, dated August 20, 1934, which said in part:

> "The Code Authorities ruled that no 5% confidential discount can be given if the highest, and the lowest selling price is more than 5%, either in list or discount; for example, if a certain faucet sold in single lots for $1.00, in thousandslots the price could not be better than 95¢, and if it was 95¢ in thousand lots, then the 5% confidential discount could not be given in addition.
>
> "Our attorneys, and the writer, claim that any published price, as long as it is not below cost, can have a differential of any size, and an additional 5% can be given, providing it is posted with the Code Authorities beyond that price."

Discussion by members of the Code Authority and NRA representatives continued for a month. The letter of the Milwaukee Flush Valve Company was transmitted to the NRA, by the Code Authority's Compliance Counsel. At the instance of Assistant Deputy Pilkington, Assistant Counsel J. M. Gallagher of the Legal Division expressed his opinion that the code clause should be interpreted as ruling out quantity schedules. However, because of possible hardship on some manufacturers, it was recommended that the Assistant Deputy suggest modification of the provision to the Code Authority.

(*) July 18, 1934 - Administration Member Report No. 9, Item 3.

Administration Member Clay wrote Mr. Pilkington on September 4,1934, that the former endorsed the Milwaukee Flush Valve Company's stand, that quantity discount schedules were permissible. The Deputy replied(*), endorsing the above mentioned interpretation of the Legal Division. Mr. Clay was not satisfied, and again enumerated the reasons for believing that his interpretation was proper.

> "I am still of the opinion that paragraph 5, Section 7 of Article VIII of the Code can be interpreted either way. It is not clear to me that the wholesale price level means only one base price and I still agree with the attorneys of Mr. Judell that various discounts can be published for various quantities, as was always customary in the Brass Industry before the Code went into effect. When these discounts have been published and filed with the Code Authority, the manufacturer can then give a special discount of 5% to the customer on the basis of volume of purchases, or any other basis, etc. To my mind the words 'other conditions of sale' are qualifying words which mean that a manufacturer can publish more than one price, provided he states the conditions which establish that price.
>
> "If the interpretation made by you and Mr. Gallagher was strictly adhered to, it would mean that there could be no discount for carload lots, which is common practice of the Industry, and shipments would have to be made by carload at the same rate as less than carload. I shall bring this matter up at the next Code Authority meeting for further discussion and hope that you will be present at that meeting, as the Milwaukee Flush Valve Company is only one of the many companies that have questioned verbally this portion of the Code. At this time we can determine whether the Code Authority desires to recommend any modification of these restrictions provisions. In the meantime I shall hold my reply to the Milwaukee Flush Valve Company.(**)

There was no solution of the problem before the Schecter decision. The last specific mention of the subject is found in the report of the Code Authority meeting of September 28, 1934, and this ended upon a controversial note:

(*) September 10, 1934, Letter from Assistant Deputy Pilkington to Administration Member Clay.

(**) September 15, 1934, Letter from Administration Member Clay to Assistant Deputy Pilkington.

"Mr. Hoffman pointed out that he could see no objection to any manufacturer filing prices for various quantities as the price for the largest quantity would constitute the wholesale level and would be the lowest price, while the smaller quantities would call for higher prices and would do no damage to the price structure of the Industry."

The provision was loosely drawn, and lent itself readily to interpretation according to the desires of the various members of the industry.

5. Restrictions on Sales to Consumers

The consumer was one of the classes named in the customer classification provision of the proposed code. However, no restrictions on sales to consumers were specified. The code as finally approved contained the following clause, passed over the general objection of Research and Planning and the specific objection of the Consumers' Advisory Board:

> "Manufacturers' sales to all others who purchase the products of these Industries for resale shall be on the retailer purchase price level, and no manufacturer shall sell the products of these Industries to any one other than for resale, except to employees for their own use." (*)

Just as the minimum differential was intended to protect wholesalers, this clause was designed to protect master plumbers. As measured by volume of correspondence and discussion, the operation of the restriction was felt particularly at three points. It affected sales to the Government, the general sale of brass repair and replacement parts to all types of consumers, and the total sales of faucets by one manufacturer, who was accustomed to sell all of his faucets, both original and replacement, direct to consumers. Since the actual classification of consumers has already been discussed in connection with customer classification, the present section will be devoted entirely to these three points.

(a) Sales to Government: Administrative Order X-48 and Executive Order 6767

On June 12, 1934, General Johnson issued Administrative Order X-48 which read in part as follows:

> "It is hereby ordered that members of industry subject to codes of fair competition who bid or may bid on contracts to be awarded by governmental agencies be and they are hereby exempted from compliance with any provisions of such codes governing the making of quotations to governmental agencies which prohibit any of the following practices and such members, notwithstanding such prohibitions contained in such codes may:
>
> (a) Quote prices and terms of sale to governmental agencies as favorable as those permitted to be quoted to any commercial buyer for like quantities;
>
> (b) Quote definite prices or terms of sale, not subject to adjustment resulting in increased costs during the life of the contract, for definite quantities and for definite periods not to exceed three months (unless a longer period is now permitted by any such code);
>
> (c) Quote definite prices or terms of sale, not subject

(*) Paragraph 4, Article VIII, Section 7. Plumbing Fixtures Code.

to adjustment resulting in increased costs during the life of the contract, for indefinite quantities and for definite periods not to exceed six months (unless a longer period is now permitted by any such code);

(d) Quote prices and terms to apply on contracts to become effective not more than sixty days from the date of the opening of bids;

(e) Quote prices F.O.B. point of origin and/or F.O.B. destination.

PROVIDED, HOWEVER, that the exemption hereby granted shall be limited to and operative only in connection with quotations made by such members to governmental agencies; that nothing in this order contained shall operate to permit deviation from or abandonment of open price and cost protection provisions now or hereafter contained in any such code; and that nothing in this order contained shall relieve any such member at any time from the duty of complying with all other provisions of such codes."

On June 29, 1934, the President issued Executive Order 6767 which authorized a cut of up to 15% below the lowest filed price on bids for government purchases. The Code Authority objected to both the Executive and the Administrative Orders. On July 5, a special bulletin was sent out by the Code Authority including the reproduction of a telegram from Assistant Deputy Jacoby as follows:

"Administrative Order X Forty Eight, does not require nor permit deviation from your code in quoting direct to the Government."

On August 2, Assistant Deputy Pilkington wrote the Secretary of the Code Authority that the Legal Division had ruled X-48 applicable to the plumbing fixtures industry on the grounds that it overruled any code provision with which it might conflict.

From this time until the end of October there ensued a conflict between the Administration and the Code Authority, culminating with the latter's circulation of a special bulletin on October 4, 1934, as follows:

"TO THE MEMBER OF CODE NO. 204 ADDRESSED:

"With reference to Quotations to Government, State and Municipalities

"On quotations to Federal, State or Municipal projects covering Plumbing Fixture requirements for a period beyond thirty days, kindly refer to Article VIII, Section 1 - ORDERS - which is as follows:

'ARTICLE VIII, Section 1. ORDERS - All orders over $100.00 shall be signed and cover specified articles to be delivered on or before a definite date. They shall be either accepted or rejected by the manufacturer when received. Only orders for stock for shipment within thirty days of date of receipt of orders, and orders for specific jobs, will be accepted at

the prices in effect at date of receipt of order. All other orders shall be subject to the prices in effect at date of shipment. The minimum size and maximum delivery time for specific job orders shall be prescribed from time to time, and exceptions to this rule allowed by the Code Authority.'

"Any departure from this section of our Code is a violation. We wish to call your attention to the fact that our code, which prohibits sales to anyone other than for resale, cannot be modified except in accordance with the provision of Article IX. In this connection, Administrative Orders X-48 and 6767, which may be considered under Section 1 of this Article have not been accepted by the Industry. On the contrary objections have been registered with the Administration concerning them."

In a letter to Pilkington on October 30, however, the Code Authority reversed itself and stated that under advice of counsel it had no right to prohibit sales to Government at other than the published prices. The controversy arose from the importance of government orders for plumbing; indeed, at one time the statement was made that practically all of the good business was at that time coming from government purchasing agents. (*)

(b) The Sale of Brass Repair and Replacement Parts to Consumers

The subject first came up in the Code Authority meeting of April 3, 1934. As reported by the Administration Member, the Code Authority agreed that the code provision prohibiting sales to consumers should apply. On April 23, 1934, however, F. S. Jeffries, Secretary of the National Brass Association, reported to the Code Authority that the Association (at a meeting in Cleveland on April 18) favored permitting manufacturers "to sell repair and replacement parts of their own manufacture to be used in connection with fittings of their own manufacture to consumers" and proposed to so amend the code provision.

On April 24, 1934, in a letter to the Code Authority, the Sanitary Brass Association endorsed this opinion, but the Code Authority had not changed its opinion. On May 22, 1934, the Sanitary Brass Association applied to the Code Authority again in a letter which reads as follows:

"Gentlemen:

"The Sanitary Brass Manufacturers' Association feel that their petition for some liberty in the distribution of repair parts could not have been clear, and as the need for it is so vital and apparent, they respectfully request reconsideration of the

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(*) Sources: Code Authority Minutes of Meetings, Code Authority Bulletins, Administration Member's Reports, Deputy's Files,

subject by the Code Authority.

"The original resolution set forth the following reasons for their petition:

"1. That repair parts are individual to each manufacturer and are not of interest or competitive to any other manufacturer.

"2. That repair parts are of vital part of the service rendered by mechanical equipment and, therefore, contain an obligation to the consumer.

"3. That if repair parts can not be secured promptly and without restrictions it will often work a hardship that will create ill will for the manufacturer.

"4. That repair parts can be imitated by manufacturers not in our industry and not subject to our Code restrictions, which will provide unfair competition for us, and through inferior quality will increase the maintenance cost to the consumer as well as reflect on us.

"Under the first reason they wish to make it clear that the repair parts referred to are those to be furnished by each manufacturer for his own product.

"Under the second reason they wish to make it clear that it is their policy to distribute their repair parts through the regular trade channels wherever this can be done without delay, unsatisfactory service, or exorbitant charges to the consumer.

"Under the third reason they wish to make it clear that it is only where a purchaser can not be properly and promptly served through the regular trade channels that they desired some liberty in the distribution of repair parts. This occurs where the repairs required in a locality are so small that they are not carried in stock by either jobber or plumber, or repairs for a discontinued item, for which the owner must usually contact the manufacturer.

"Since the Code was adopted, a number of instances have occurred which emphasize the need for the liberty requested. One manufacturer reports several cases of large installations in isolated localities where the owner was referred to his local plumber. After trying to get repairs, not only in his own town, but in several surrounding towns without success, the owner notified the manufacturer that the use of his product would be discontinued unless he could secure the same prompt service he had before. Another case was reported where a large Government institution discontinued the use of a product because it was referred to the trade for repair parts.

"It is the opinion of the Sanitary Brass Manufacturers' Association that there is nothing in the Code which governs the distribution of repair parts--that the use of the word "product"

throughout the Code clearly indicates that this was intended to mean a complete product and not a repair part, which is also evidenced by the exception of repair parts in the last paragraph of Section 7 of Article VIII. Consequently, we do not believe it is necessary to make any change in the Code, or to hand down any ruling or explanation, but simply to state as a fact that the Code does not cover the distribution of repair parts."

In the meeting of June 15, 1934, the Code Authority voted to petition NRA for a limited stay on the clause, in accord with the request of the brass groups. On August 10, 1934, the NRA issued a "Notice of Opportunity to be Heard" requesting submission of information before August 23. On the 15th the Divisional Code Authority for the Plumbing Contracting Division of the Construction Industry wrote objecting to such a stay on the ground that it "would encourage violation of State and local ordinances" and that it would seriously affect the health of the nation. The plumbing contractors further claimed that the true purpose of the proponents of the stay had not been revealed.

"If it is their desire to sell fixtures direct to the public, and encourage violations of State and local laws and ordinances, they should be frank in saying so and not attempt to bring about such a condition through representing that they propose to sell merely repair and replacement parts."

In reply to an inquiry from the Compliance Council Assistant Deputy Pilkington telegraphed the Code Authority to the effect that the stay had not yet been granted. It never was. (*)

(c) The Bashlin Co.

On August 23, 1934, J. E. Hazeltine, Treasurer of the Bashlin Co., Warren, Pa., wrote General Johnson that the company had signed up under the Fabricated Metal Products Code rather than the Plumbing Fixtures Code, because of the respective rates of assessment. On September 27, 1934, Assistant Deputy Pilkington replied that code jurisdiction depended on the products manufactured, and that he thought the company should come under the Plumbing Fixtures Code.

By October, 1934, Mr. Hazeltine had examined the Plumbing Fixtures Code and Code Authority and expressed willingness to come under the code, if the provision prohibiting direct sales to consumers were stayed,:

"An examination of our catalog, gladly sent under separate cover, will reveal the fact that ours is in cost not a competitive product. Actually, Bashlin faucets cost the user about 50 per cent more than do others of good grade and it is our job to convince the prospective customer that this extra cost is offset by unusual service of these faucets.

(*) Sources: Code Authority Bulletins, Minutes of Meetings, Administration Member's Reports, Deputy's Files.

This selling effort is made by manufacturers' representatives working on a commission basis, costly experience having proven to us that neither the plumber, who objected to the renewable features, nor the jobber would help us.

"To avoid conflict with the plumbing fraternity, we began about 30 years ago the introduction of Bashlin faucets to State and Federal institutions and to hospitals as well as large public schools who habitually employ their own registered plumber. During these years a valuable trade in these channels has been built and now the Code Authority says we may not deal direct with these institutions whose patronage is the life of our business.

"Jobbers never have and will not keep on hand even a modest assortment of our goods nor have they, except in one instance, helped in their introduction, always arguing, 'The price is too high.' Now the Code demands that our representatives refer orders to the jobbers and thus share with the jobbers the commission really earned by our agent. We contend that, having no investment of time or money in the sale of Bashlin faucets, the jobber is not entitled to a position that bars our transactions direct with the institutions mentioned.

"Our product is in reality a specialty not competitive with the usual type of faucet or plumbing fixture. We have, as already described, opened a channel of trade that years ago avoided conflict with the plumbers' organizations and now are threatened with the loss of our business by the imposition of a factor that will disturb the direct contact with long established patronage which must now be charged a still higher price in order to compensate the jobber unless our agent, who has done all the work, relinquishes to the interloper a portion of his well earned commission."

After further correspondence, NRA granted the company complete exemption from the clause (*) on December 14, 1934.

6. Resale Price Maintenance

The first proposed code of the plumbing fixtures industry contained a resale price maintenance provision which, if approved along with the price maintenance provisions in the proposed codes for the plumbing wholesalers and for the plumbing contractors, would have made the enforcement of resale prices an actuality. None of these was approved. There were, however, several clauses in the approved code for the

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(*) Sources: Deputy's Files; Administrative Order 203-23.

plumbing fixtures industry which indicated the manufacturers' desire to maintain resale prices. (*)

The two distributing industries were not able to have such provisions approved in their codes, largely due to a strengthening of NRA policy. Nevertheless, since the sentiments of manufacturers, regular wholesalers, and master plumbers seem to have been in harmony, this feeling might have been expected to achieve resale price maintenance by the use of Section 7 of Article VIII of the Plumbing Fixtures Code. As a matter of fact, it is rather difficult to determine the effects of the approved code provisions on resale prices.

The clauses in the approved code having a bearing on resale price maintenance include among others the last paragraph of Section 7 of Article VIII, which reads as follows:

> "In order that the consumer may be informed of the fair prices of products of the Industries, each manufacturer shall publish and distribute a suggested fair price for sales to the consumer of each of his products, except parts and specialties."

The other pertinent provisions centered largely around the attempt to protect the more or less accepted method of distribution; these include the power to determine a minimum wholesale-retailer differential, the prohibition of sales to consumers, the requirement that members segregate their levels of business for accounting purposes, and the provisions which implemented the foregoing rules, namely customer classification, the filing of lists of distributors, and price filing. This array of provisions made possible the achievement of resale price maintenance despite the fact that the provision originally proposed was not approved.

(*) See: Rule B-5, Resale Prices of the proposed Wholesale Plumbing Code, September 23, 1933 edition, also Article VII, Section 31 of the January 17, 1934 edition; Article VI, paragraphs (a) and (c) of the proposed code for the Contracting and Retail Division of the Plumbing and Heating Industry, August 25, 1933 ed.

Complete resale price maintenance very possibly could only have been effected if all trade factors had been brought under one or the other of the two distributors' codes. The realization of this fact was to a large extent responsible for the delay in approval of these two codes. The fact that the direct resale price provisions were eliminated from all the plumbing codes made it all the more important for all parties to enforce certain uniform code regulations which would have restricted in no small measure both the costs to the distributors and their prices to the next level. Such regulations included those enforcing segregation of levels of business, prohibitions on direct sales, and any other clauses tending to standardize manufacturer - wholesaler - retailer - consumer price levels.

The expectation among manufacturers seemed to be that by protecting wholesalers and plumbers, manufacturers would in turn receive protection. As has been indicated above, there were grounds for such a belief. As late as March, 1934 (the Plumbing Fixtures Code was approved January 13, 1934), the proposed Wholesale Plumbing Code contained provisions making it unfair competition for any wholesaler to quote or sell at lower than the manufacturer's published price levels, requiring any wholesaler who performed retailing functions to segregate his levels of business, prohibiting sales at wholesale prices to other than retailers and industrial users, and authorizing price filing. The last proposal was designed to "spotlight" those wholesalers who were not observing the manufacturers' list prices, thus making it possible for both the organized manufacturers and the master plumbers to boycott such concerns. As approved, the Wholesale Plumbing Code contained all but the direct resale price provision. However, its customer classification had been made less rigid and several other restrictive provisions had been deleted.

In the minds of the manufacturers probably the two most important obstacles to the maintenance of resale prices during the life of the Plumbing Fixtures Code were mail order house competition and the long delay in approval of a code for the wholesalers. In the meeting of March 20, 1934, there was some discussion of the problem raised by the absence of a wholesalers' code and the effect of this absence on manufacturers who sold direct to retailers. Apparently such manufacturers, a large proportion of whom were in the brass division of the industry, were very reluctant to file prices because they wanted to be in a position to meet the competition of wholesalers. (*)

This desire for exemption from the price filing provision of the Code, in so far as it applied to the retail level, became paramount in the case of the John Douglas Company, which was accused of violating the Code by selling to plumbers and not filing prices for such sales. The company corresponded with the NRA on the subject. Eventually exemptions from filing prices on the retail level and from the code provision forbidding lump sum bidding were granted. The company had to withstand the competition of wholesalers on lump sum bidding, which was prohibited by identical provisions in both the approved Wholesale Plumbing and Heating Code and the Plumbing Fixtures Code. (Article VII, Section 8 in the former; Article VII, Section 6 in the latter.)

The following is an illuminating passage from the Code Authority minutes of June 15, 1934:

> "The Secretary reported receiving notice from the N.R.A. Legal Division that several unnamed complainants had filed complaints direct with the Government against the John Douglas Company for failure to file their published prices for the retail level, and that he had received a 'phone call from Mr. Gallagher, of the Legal Division, stating that no action would be taken

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(*) Administration Member's Report No. 1. op. cit.

against Douglas unless Standard Sanitary Manufacturing Company and Crane Company are also forced to file their prices for the retail levels. The Secretary was instructed to write the N.R.A. to the effect that they could take whatever action against the latter two companies they saw fit, and call their attention to the difficulty of controlling sales on the retail level until the wholesalers' code has been approved." (*)

The particular problems faced by the John Douglas Company were stated in a letter from the company to Assistant Deputy Jacoby, which read, in part, as follows:

"In reference to this subject you will remember that we had considerable correspondence with you at the time the plumbing fixture industry code was being arranged and at that time we advised you that our position was a rather unusual one owing to the fact that, while we were manufacturers the same as all others in the industry, our merchandising policy was entirely different in that we sold at least 95 per cent of our product to the plumber or retailer and practically all of the other manufacturers were selling to the wholesaler or 'Direct to You' houses.

"In view of our situation it is impossible for us to publish net prices to the plumber or to fix the plumber's discount until such a time as the wholesaler's code has been signed and until the maximum discounts which the wholesaler will allow the retailer have been definitely decided and which is provided for in section seven, article eight of the Plumbing Fixtures Industry Code.

"As matters now stand the manufacturers may have some uniformity of discounts to the wholesaler which of course establishes the wholesaler's cost but as long as one wholesaler is privileged to add 25 per cent and another wholesaler may be adding only 5 per cent to his cost it is certainly impossible for us in competition with such wholesalers to establish our price to the plumber. Under the circumstances we have to meet competition as we find it and to be publishing a price to the plumbers under such circumstances knowing that we could not adhere to it, would be only subterfuge.

"We again ask that our proper classification and status under the Code be determined so that we will understand

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(*) Code Authority Minutes of Meetings, June 15, 1934, Code History Exhibit C.

whether we rightfully belong under the wholesaler's code or the manufacturer's code." (*)

This delay in the approval of the wholesale code affected not only the willingness of manufacturers to file their retail price level, but also the desire of the Code Authority to expedite the establishment of a wholesale-retailer differential, as is discussed in an earlier subsection of this section. Both actions amounted to a refusal to bind manufacturers to price levels until the wholesalers themselves were bound. This view of the importance of a Plumbing Wholesale Code may be illustrated by excerpts from the report of the Administration Member, of April 3, 1934:

"Item 8. There was considerable discussion of the lack of market stability and the fact that the Jobbers Code had not yet been issued. A motion was made, seconded, and passed that the Administration Member be asked to request the Administration to expedite the Wholesalers and Retailers Code in order to bring about greater stability in prices. Accordingly, the Administration Member makes this request as a part of this report and cites several instances to sustain this request for early action.

"For example, at the present time it is understood that secondhand dealers can purchase from wholesalers, even though manufacturers are not authorized to sell secondhand ware under the terms of their code. Again, it was pointed out that certain purchasing corporations were publishing letters to various of their clients in which they make deliberate attempts to avoid the provisions of the code pertaining to the Plumbing Fixtures Industry..."(**)

On June 15, 1934 the Administration member reported as follows:

"Item 15. Report of Classification Committee:
The list of wholesalers prepared by the Classification Committees of the Pottery and Enamel Groups were examined. It was decided to give each manufacturer an opportunity to comment on the names of any of his so-called wholesalers who were omitted from the list before any publishing is done. The committee was urged to expedite this matter so that the lists might be available by the time the Wholesalers Code is approved."(***)

(*) Letter of June 15, 1934, from C. W. Metz, President of the John Douglas Co., Cincinnati, Ohio - Deputy's Files, Note: the exemption was granted July 31, 1934, and it was terminated December 31, 1934 largely because the wholesalers' code had been approved.

(**)Administration Member Report No. 2 op. cit.

(***) Administration Member Report No. 7 op. cit.

It is evident from these and other similar comments that certain manufacturers were thinking very definitely in terms of price levels within each one of which the individual prices would be uniform.

The effect of mail order house competition on the price level and the influence of the declining price level itself tended to make far less important the maintenance of resale prices. When the date of approval of the Plumbing and Heating Wholesale Code arrived, the existence of such a code was of very little significance. (*) Early in 1935 every manufacturer who was still in operation was devoting himself to meeting strong competition in the final market.. There was a considerable lowering of the price level to consumers, consisting in reduction both in the net price to manufacturers and in the discounts to distributors. Far less emphasis was placed on helping to maintain a price level and far more in meeting demands of distributors that net costs to them be such as to allow them to stay in the market and meet the local price level. The story of the effects of the code on the price level and vice versa will be told in more detail in a later section. It is here necessary only to note that an important price situation existed and to suggest its effect on resale price maintenance.

Another development applied specifically to the clause, quoted above, directing manufacturers to publish suggested prices to the consumer. Apparently the manufacturers did not consider the provision mandatory, and, as reported by the Compliance Counsel in a letter to Assistant Deputy Pilkington, this feature was omitted from many of the price sheets issued by members of the industry. Mr. Parker, the Compliance Counsel, in the letter referred to, requested an NRA ruling as to whether or not the provision was mandatory. (**) In the Code Authority meeting of December 12, 1934 the subject was discussed.

> "Item 12: (a) Consumer Prices. It was pointed out that manufactures could not publish consumer prices under present conditions. It was stated that prices published by mail order outlets fluctuated to such an extent in various sections of the country that it would be impossible to publish consumer prices and adhere to them. The Chairman stated that a list of suggested prices could be published but no action was taken."(***)

(*) It is quite true that even when finally approved the wholesaler's code did not become effective. The controversy over the exemption of wholesale hardware houses and the half-hearted support of mail order houses kept the provisions mentioned above from becoming operative. On the other hand, it is very doubtful if price filing would have given any more aid to wholesalers than the provision in the manufacturing code gave to manufacturers. The market was altogether too unstable.-- Author.

(**) N.K. Parker letter of October 9, 1934 to D.G. Pilkington, Deputy Files. Action was never completed by the Administration.

(***) Administration Member Report No. 13, Item 12 op. cit.

The reason given for the impossibility of publishing consumer prices went back, at least partially, to the effects of the mail order house competition and of the price level.

There is practically no record of any discussion of the provision requiring the manufacturer to segregate his levels of business, and the other provisions which were designed to restrict manufacturers and protect distributors seemed not to have had any particular effect on resale prices. These provisions are discussed in other sections of this chapter. In sum, the relative importance of certain other developments in the industry in the code period apparently overshadowed completely the original desire of the code proponents for resale price maintenance. The logical conclusion seems to be that resale prices were not maintained and further, that in many cases manufacturers did not want them maintained.

C. The Mail Order House Conflict

The conflict about mail order distribution probably was the most important development under the Plumbing Fixtures Code. Although it has been mentioned in the discussion of customer classification, it cannot be adequately summarized in the discussion of any single code provision. The strategy of the conflict depended upon the joint effect of customer classification, preferential discounts, price filing, prohibition of sales below cost, and the code restriction on orders.

1. Introduction - The Three Stages of the Conflict.

The pre-code conflict between mail order houses and the code proponents arose when the two classes of so-called regular distributors proposed that the manufacturers change the customer classification provisions appearing in the original proposed code. (See Section I of this Chapter.) Mail order houses and "direct-to-you" concerns constituted one of the five classes of customers named in the original code. This first proposed code also gave the Code Authority power to fix trade discounts. Although the discounts were not specified and there is no indication of what treatment was to be accorded the five groups, the wholesale and master plumber associations were afraid that mail order houses might be given wholesale and possibly better than wholesale discounts. They were in complete agreement that mail order houses were retailers.

The Code, as approved on Jan. 17, 1934, is witness to the bargaining power of the wholesalers and the master plumbers. Article VIII, Section 7, of the Code defined a wholesaler in such a way as to eliminate mail order houses from that class, by such requirements as that wholesalers sell in bulk as well as buy in bulk. But the clause was stayed in the Order of Approval, and as finally revised, defined the function of wholesaling in such a way as to admit mail order houses. This action settled for these concerns the question of customer classification as such and thereby ended the first stage of the conflict.

The second stage was one of non-compliance by the firms supplying mail order houses. Several code provisions remained as restrictions on the mail order method of doing business. Rather than submit to any of these regulations, the mail order houses and the manufacturers supplying them refused to disclose their marketing practices, preferring not to comply with the publicity requirements of the code. Since this problem was never settled during the life of the code, the second stage of the conflict never ended.

The third stage of the conflict took the form of a price war. The attention of the industry as a whole became focused on the consumers' price level, which was being considerably upset by mail order house prices and by the actions of Standard Sanitary Manufacturing Company in meeting these prices on a nation-wide scale. This third stage led to general dissatisfaction with all of the important code provisions and eventually to a complete breakdown of code operation. It will be described further in Section IV.

2. The Second Stage - Refusal to File Mail Order Contracts.

(a) Preliminary Code Authority Actions.

The first Official Bulletins issued by the Plumbing Fixtures Code Authority, Feb. 21, 1934, among other things, called for the filing "with your proper Association on or before the date indicated, the following:

> .....copies of all price lists, discount sheets, freight allowances and other sales and service literature which in any way affects your net delivered price to the purchaser."(*)

On March 3, 1934, Official Bulletin No. 5 was issued, requiring "members of the industry to file on or before March 17, 1934, with the proper reporting agency for the particular industry", the following:

> "1. The names of all customers being sold on March 1 or at the present date on the wholesale purchase price level.
>
> "2. Two lists of the names of customers to whom "special (confidential) discounts were given, classified according to the amount of each such special discount.
>
> "3. There must also be filed immediately all sales contracts in effect as of March 1st, 1934, extending beyond thirty (30) days from March 1st, whether on a cost plus, fixed price or other basis. (Such contracts are part of your published prices and should have been filed prior to February 28, 1934, with price lists and other sales literature called for in Official Bulletin #1." (**).

The first two parts of the above bulletin were specifically authorized in paragraph 6 of Art. VIII, Sec. 7; on the other hand, the third was not. The Code Authority here seems to have taken the liberty of applying the price filing clause of the code to the provision placing restrictions on orders, Sec. 1 of Art. VIII. The latter required all orders over $100.00 to be signed and to cover "specified articles to be delivered on or before a definite date." Such orders were to be either accepted or rejected by the manufacturer when received and "only orders for stock for shipment within thirty days of date of receipt of order, and orders for specific jobs" might be "accepted at the prices in effect at date of receipt of order."

The 30 day interpretation in the Code Authority's bulletin was apparently based on this clause of the code. The right to make such an interpretation was not questioned until some two months later. It seems fairly apparent that the kind of publicity called for by the price filing provisions included the publishing and filing of all prices and

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(*) Code Authority Bulletin No. 1, Code History, Exhibit P.

(**) Code Authority Bulletin No. 5, op. cit. Original underlining.

conditions of sale. In other words, the actual price terms contained in the contracts were of importance. It is not so apparent, however, that the contracts themselves, including names of buyer and seller, were to have become public. Neither is it clear why the call for the contracts should have been limited to those of 30 or more days duration. Furthermore, and more important, it is not clear why the terms contained in such contracts were interpreted as terms applicable to a "class of purchaser" rather than as special terms comparable to the special, and hence confidential, discounts provided in paragraphs 5 and 6 of Art. VIII, Sec. 7.

(b) Non-Compliance with the Call for Mail Order Contracts.

(1) The Point of View of the Code Authority.

Regardless of any such questions and although non-compliance extended to several other code provisions, the refusal by certain manufacturers to file their contracts became the focal point of the attack by members of the Code Authority.

In the Code Authority meeting of April 3, 1934, Mr. Chase, Counsel for the Code Authority, submitted complaints against approximately 42 companies, principally on the grounds of refusal to file information called for in the Official Bulletin. Seven of these complaints were against concerns who were suspected of having mail order contracts and who were accused of failing to file these and their special discounts and other terms of sale. The companies complained against, in this connection included:

Rundle Mfg. Co.
National Sanitary Co.
Conemaugh Iron Works
California Foundry and affiliated companies
Elger Company
Universal Sanitary Mfg. Co.
Washington-Elger Company and affiliated companies(*)

The first discussion centered around the very points raised in Section (a) above. The report of the Administration Member on this particular one seems worth reproducing.

According to Major Clay, Administration Member:

"..... The Secretary reported that the National Sanitary Co. had furnished information with respect to terms of sale contained in their contracts, but required that these terms be kept confidential. The Conemaugh Iron Works also filed data pertaining to their contracts but insisted that these data be kept confidential until all contracts from other manufacturers were received. Considerable discussion ensued about the filing of these contracts existing between manufacturers and mail order houses. Mr. Chase read Sec. 10, Art. VIII of the Code which applies to the filing of these data.

(*) Code Authority Minutes of Meeting - April 3, 1934, op. cit.

"While Sec. 7 of Art. VIII states that the names of customers sold by manufacturers on each price level shall be kept confidential, it does not require that actual conditions of sale shall be withheld from other members of the code. In fact, the Code Authority is required by Sec. 10 of Article VIII of the Code to distribute such price information except the special discounts provided in Sec. 7 of the Article, to all manufacturers of the respective industry. The Secretary stated that he had another contract from a seat manufacturer which had been forwarded to him without any restrictions as to the release of the data contained therein.

"The procurement of copies of these contracts is a mooted question and caused a great amount of discussion on this subject. As the matter stands now, the Secretary has one contract the terms of which can be released without restriction, while two others have been filed with restrictions on the release of the data contained therein. Others have refused to file to date. A motion was made by Mr. Reed, and seconded and passed that the contracts filed with restrictions be returned by the Secretary with the statement that complaints would be filed as the manufacturers had not complied with the code. Mr. McAfee stated that he believed that some companies were holding up this information because they questioned the legality of furnishing copies of the contracts to the Code Authority. Mr. Reed made a further motion which was seconded and passed that the one contract of the seat manufacturers now held by the Secretary be retained in his possession until the other contracts were received from the various manufacturers involved.

"This subject of mail order contracts was referred to in, the last paragraph of Item 9 of report No. 1, submitted by the undersigned. It appears that all manufacturers are anxious to obtain the information with respect to conditions of sale, as set forth in these mail order contracts. Further, the Code Authority plans to release the information contained in such contracts as are filed as soon as a sufficient number have been filed without restrictions, in accordance with the terms of the code.

"While Section 10 of Art. VIII states that this information must be filed with the Code Authority and the Code Authority shall distribute such price information, except the special discount as provided in Section. 7 of Art. VIII, the question was raised as to whether the conditions of sale as set forth in the contract might not be construed to be special discounts which the Code Authority is not authorized to distribute to other manufacturers in the industry. This point is brought out as it may arise at a later date when the Code Authority publishes information contained in the copies of contracts filed with it. Some manufacturers may object to this procedure and request the terms of their contracts be kept confidential and not distributed to other manufacturers, in accordance with his understanding of Sec. 7 and 10 of Article VIII.

"As a result of complaints being filed against those who have not submitted their copies of contracts to the Code Authority, it

is believed that other companies will furnish this information at a later date. However, it can be seen that there are arguments on both sides as to whether the terms of these contracts should be made available to all manufacturers. The Administration member believes that the terms of the contract should be made available to all manufacturers if we are to operate unrestrictedly under the open price policy."(*)

Two gentlemen who took prominent parts in the discussion included Mr. Henry M. Reed, President of the Standard Sanitary Mfg. Co., and Mr. W. Keith McAfee, President of Universal Sanitary Mfg. Co., one of the companies complained against. The Administration Member reported that:

"....During the discussion of the subject of the mail order contracts, it was brought out that Mr. W. Keith McAfee, a Member of the Code Authority, is also the operating head of the Universal Sanitary Mfg. Co. which company has not filed its mail order contracts and thus has had a trade practice complaint filed against it. The chairman of the Code Authority raised a question as to whether any member of the Code Authority could sit on that body and at the same time represent a manufacturer who fails to comply with the provisions of the code. It is understood that other manufacturers are commenting on this particular phase of the matter. In other words, Mr. McAfee as a Code Authority Member, is called upon to support action and complaints against other violators of the code, while at the same time his own company refuses to comply with code provisions. Certainly it is an embarrassing position for Mr. McAfee.

"As a result of the discussion, Mr. McAfee asked to withdraw temporarily from the Code Authority session in order that he might contact his home office and his customer involved in the mail order contract. After several hours, Mr. McAfee reported back to the session and stated that his company was very anxious to file their contract and have its provisions published but could not do so until they had the permission of their customer and the customer could not be reached by telephone. Further, Mr. McAfee stated that his company had no copy of the contract; that the Sears-Roebuck Company had retained both copies. He added that the Sears-Roebuck Co. was now paying the full jobbers price for their goods. Accordingly, the matter was held in abeyance pending the further report from Mr. McAfee in regard to the decision of his customer." (**)

The Code Authority decided to send a telegram to Washington asking the Compliance Director to take immediate action to force "these recalcitrants to supply the same information which their competitors have already filed." Members of the Code Authority argued that while many of the manufacturers having mail order contracts had filed their

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(*) Administration Member Report No. 2. op cit.

(**) Administration Member Report No. 3. op cit.

wholesale price lists, they have not filed the conditions of sale under mail order contracts and therefore were in effect operating on two wholesale price levels, and that customer discrimination was therefore involved.

(C) Defense by the Companies Complained Against.

Complaints against the companies listed above were filed with the NRA shortly after the Code Authority meeting in which their names were read. On May 1, five of the manufacturers filed a brief with Assistant Deputy Jacoby in support of their position in refusing to disclose the contracts. This brief was accompanied by a letter from each of the five detailing the reasons why it would be particularly impossible for him to comply. The brief itself read, in part, as follows:

"We, the undersigned manufacturers, are members of the Plumbing Fixtures Industry, operating under Code No. 204, approved January 13, 1934. We are all paying more than the minimum wage required by this Code, are respecting the maximum hours and all other labor provisions, and heartily approve the three sections covering labor provisions as well as most of the other provisions contained in the Code.

"There are, however, certain provisions in this Code that are permitting monopolistic practices and if relief is not granted to the small manufacturers it will eliminate, oppress, and discriminate against small enterprises. We have held a meeting and submit the attached letters outlining our individual problems.

"We object to the following provisions of this Code for the reasons stated in the attached letters and ask that exceptions be granted us under these sections, s.

"Article 7, Section 1

"That we be allowed to compensate those wholesale distributors who perform a warehousing, distributing, and selling function for us on a different basis than that basis on which we sell those distributors who merely use us as a convenience during the busy season, and that we be not restricted to the 5 per cent differential referred to in this paragraph and again in Section 7, Article 8.

"Article 8, Section 1. -30 Day Clause

"We request that we be not required to conform to that portion of this clause requiring all order be taken for shipment in 30 days.

"Article 8, Section 7.

"That we be relieved of all restrictions set forth in this paragraph because:

"A. As small manufacturers we do a considerable portion of our business with other manufacturers who are not members of this Code, with railroads, with large corporations who buy continuously, Government, States, and municipalities, who the Code Authority classes as consumers.

"B. Five per cent in no way measures the difference in the type of service performed by different types of distributors for us. We are dependent upon certain large distributors who perform the services for us that the large manufacturers perform for themselves with their hundreds of warehouses, large sales organization, advertising, etc., etc. This costs the large manufacturers much more than 5 per cent, and we must be allowed to compensate our distributors for the services they perform. On the other hand we have many distributors who do not perform a like service and who are not deserving of a like consideration.....

Respectfully submitted,

Rundle Manufacturing Company
by H. Held, Pres.

Standard Tank and Seat Company
by A.W. Stedman, Pres.

Universal Sanitary Mfg. Company
by Fred A. Glenn, Vice Pres.

Milwaukee Flush Valve Company
by J. S. Judell, Pres.

National Sanitary Company
by L. E. Crane, Pres."(*)

One of the five, Milwaukee Flush Valve, in its letter submitted with the brief, gave the reasons for its reliance on mail order houses:

"Until 1928 our company catered entirely to the so-called legitimate jobbing trade. The three large nationally known manufacturers were among our customers and took a very large percentage of our output. However, in 1928 we noticed a considerable falling off of our business primarily due to the fact that big nationally known manufacturers started to make all their own goods and further took away some of our customers by buying them up and making branches of them. Therefore, after due consideration we found it necessary to find other outlets and took on mail order and D-T-U business, which gave us a new lease on life. In taking on this business we found our selling expenses were practically nil. Our advertising cost and credit losses were cut to a minimum. Last but not least it gave us a volume and gave it to us at a time when our plants would practically have to shut down,

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(*) Code History, Special Exhibit, Volume I a.

namely, during the dull months. It gives us an opportunity to manufacture on a more even basis and spread our employment over the whole year, and not have to hire a lot of men during the rush season and lay them off during the dull season.

"We were able to pay a better than average wage and give steady employment throughout the whole depression and at the same time stay in black." (*)

The National Sanitary Company referred to the confidential nature of the information requested by the Code Authority and expressed the fear that even if the information were not distributed to members of the industry it would be disclosed to members of the Code Authority. At the same time the company proposed showing the "contracts to NRA officials at Washington for their confidential information and any survey they care to make." National Sanitary went on to a description of their methods of doing business and the position of the mail order houses in the following words.

"Certain of the larger manufacturers in our industry own their own distributing outlets, have warehouses and show rooms at strategic points and perform the complete distributing function up to the point where the ware is sold to the contractor during the installation. Other manufacturers sell their products direct to the contractor. Other manufacturers sell their product to large wholesale houses who handle plumbing material as they do other lines and who in turn sell to retail hardware houses. Still others dispose of a large part of their products to mail order houses and direct to consumer houses who take the ware from the shipping platform and perform the functions of distribution to the ultimate consumer. It is obvious that in the function of distribution by these several factors there are involved various items of expense including warehousing, advertising and selling, both wholesale and retail.

"For the above reasons it is not possible to encompass within the 5% differential referred to in the Code a sufficient spread to cover all of these various functions. The prime thought of a 5% spread named in the Code was that of a quantity discount to large buyers; but when it is borne in mind that some manufacturers perform warehousing and other functions that cost much more than the 5% in the aggregate, the setup as described in Article VIII does not provide a workable solution for the small manufacturer who is not so organized as to perform such function himself. It is obvious that the distributor who performs the greater number of services should receive price considerations sufficient to cover such warehousing and other services thus rendered as compared with the distributor who does little more than act as a broker.

(*) Ibid.

"We feel that the clause in this paragraph that refers to booking orders for thirty days requirements which may be applicable in certain types of distribution is not applicable where the manufacturer sells a product that takes approximately 30 days to manufacture and which in certain instances because of the manufacturer's dependence upon the organization of types of distribution involving cataloging, advertising and sales planning, makes it necessary for the contract of a much longer period than the 30 days referred to in said Section VIII.

"For the above reasons we respectfully request exception as regards the above filing of documents of a confidential nature except with the NRA officials at Washington. We further request an exception as regards the maximum of 5% spread and the 30 days contract period wherein it applies to the confidential contracts referred to herein and other deals of similar nature." (*)

The mail order contracts were entered into al ost immediately prior to the code. In the main they were year contracts with cost plus terms, to be figured at the end of each six month period. In other words, the mail order houses bought on the wholesale price level current in the market, but at the end of every six months were rebated the difference between the wholesale level and the manufacturer's cost plus a prescribed margin. Although this margin was never disclosed in any of the correspondence or discussions, statements appearing in the letters from the five manufacturers to NRA of May 1 implied that the price terms amounted to better than 5% lower than the wholesale price level. These terms the companies considered confidential information and it is quite evident that the mail order houses did too. The effects of disclosure of the information could hardly have been estimated. The object of the dominant members of the Code Authority seemed to have been to eliminate the special considerations, limiting the extra discounts to mail order houses. The dissenters argued, however, that the actual effects would have been to lower the entire price level to that occupied by mail order houses. This view was expressed by Mr. Judell of Milwaukee Flush Valve when he appeared personally before the Code Authority in its meetings of July 18, 1934:

"The filing of our contract with the Mail Order Houses for Plumbing Brass goods would wreck the price structure now existing in the Industry."(**)

Nevertheless the five or more companies who sold to mail order houses seemed to consider the transactions were made on an equitable basis and that they were not forced to sell below cost. They felt that certain services performed by the mail order houses -- advertising, warehousing, buying in bulk, spreading purchases over a period of time,

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(*) Ibid.

(**) Administration Member Report, No. 3, op. Cit.

etc.,-- warranted the differential treatment.(*)

(2) Administrative Action - The Handle Case

The NRA was made to feel the importance of the mail order house situation in March, 1934. The complaints mentioned above were filed early in April. On May 1 and 2, Major Clay, Administration Member, and Assistant Counsel Gallagher agreed that immediate action was necessary because the entire code trade practice provisions, particularly the price filing clause, were at stake. They agreed also that:

> "all manufacturers holding mail order contracts and against whom complaints have been filed by the Code Authority, be requested to furnish originals of true copies of their contracts to the Division Administrator in Washington for perusal and transmission to the Deputy Administrator and the Legal Division handling such affairs. Upon receipt of these contracts in the Legal Division the provisions thereof will be checked against the requirements of the Codes of the Plumbing Fixtures Industry. Where it is shown that these contracts clearly violate the code, it is recommended that the manufacturer involved be informed of such fact and be requested to arrange with his customer to cancel the contract by mutual agreement or change the terms to conform to the provisions of the code now in existence. In cases where it is impossible through legal considerations to change the contracts or cancel the same as this time, it is recommended that such action be taken when the first date specified for renewal arrives." (**)

On May 11, the National Compliance Board held a hearing in Washington on the complaints, as the result of which, at the next meeting, the Code Authority members expressed themselves to the Administration Member as "rather discouraged..... There was a feeling that efforts were being made to circumvent the filing of mail order contracts and that the Administration was not pushing this matter."(***)

Following another hearing held by the Compliance Board on June 11, the Board turned the cases over to the Litigation Division for enforcement. As detailed in a Code Authority bulletin reporting on compliance activities, four complaints were filed against enamel ware manufacturers, three against vitreous ware manufacturers, and one against a seat manufacturer.(****)

(*) In letter of October 5, 1934 from a member of the industry to Assistant Deputy Pilkington, however, the statement is made that "Having formerly sold Sears-Roebuck we can testify that any manufacturer who sells their plumbing fixtures does so at a loss and this is particularly true today at the present prices of vitreous china closet combinations." Code History Special Exhibit, Volume V.

(**) Administration Member Report No. 4, op. cit.

(***) Administration Member Report No. 6, op. cit.

(****) Code Authority Bulletin No. 29, 6/28/34, Code History Exhibit P.

The Litigation Division prepared cases against three companies, not for refusal to file mail order house contracts, but to secure injunctions against violations of the code which the Code Authority's complaint indicated might be contained in the terms of these contracts. (*)

A test case against the Dundle Manufacturing Company was decided upon by the Litigation Division and was argued before the United States District Court at Milwaukee on July 20 and 21. The case was still undecided at the time of the Schechter decision.

D. Price Demoralization During The Code Period, Its Causes and Effects.

1. Mail Order House Prices - The Third Stage of the Conflict

The third stage of the conflict about mail order houses was a price war. The dominant Code Authority members were representative not only of a large element among manufacturers, but also, to a considerable extent, of the organized plumbing wholesalers and master plumbers. Other members of the industry, on the other hand, were dependent on the market provided by the mail order houses; and although they had been placed on the defensive by the appearance of having flouted the code, nevertheless they were in an impregnable position because of lack of complete NRA agreement with the Code Authority's actions and because their punishment finally depended on a court decision which was not forthcoming during the life of the code.

A series of prices collected from Sears-Roebuck shows an almost unbroken descent from June, 1934 through March, 1935 to the lowest point ever reached in the industry. In May, 1934 there were indications that the mail order houses themselves were taking the offensive in a price war. These prices showed a continuous decline from 1926 to March, 1933. By March, 1934, they had risen only back to their 1932 level. The Bureau of Labor Statistics composite wholesale price index of five items,

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(*) Memorandum of August 3, 1934, from Assistant Counsel J. M. Gallagher to Assistant Deputy D. C. Pilkington. Deputy's files. The memorandum was in reply to one from the latter requesting an opinion as to the right of the Code Authority to withhold the Blue Eagle from these companies. Gallagher went on to say in his reply that to the best of his knowledge the Compliance Board never ruled direct violation nor that the Blue Eagles of the respondents should be withdrawn or withheld. He considered it very important that the matter be made clear to the Code Authority. Later, December 5, 1934, in a memorandum from Assistant Counsel W. W. Swift to Pilkington (Deputy's files, a very similar opinion was given on the right of the representative of a company, which the Code Authority considered to be in violation of the code, to sit on the Code Authority. The precedent given as reference was Office Order 93, and the individual to whom the Code Authority referred was of course W. Keith McAfee. Swift stated that the office order prohibited service on the code authorities of persons who had been (a) convicted of a code violation by a court of competent jurisdiction, or (b) duly deprived of the use of NRA insignia by the Compliance Division.

on the contrary, shows prices in the latter part of 1934 higher than the index of March and April, 1933 which stood at 58.8 when converted to a 1929 base. Comments by industry members and the mortality of concerns in the industry suggest that the Sears-Roebuck prices more accurately reflect industry conditions for present purposes. It should be borne in mind that they are retail prices and that the Bureau of Labor Statistics does not take account of all changes in terms of sale during the code period.

Price changes downward by these trade factors were bound to cause consternation among plumbers and wholesalers as well as among manufacturers who distributed through these channels.

Members of the Code Authority first took notice of the price situation in the meeting of May 11, 1934, when the view was expressed that a price war was in process and that this was due in part to the attempt to enforce the filing of mail order contracts.(*)

In a meeting of July 18, the complaint was made that mail order houses were selling plumbing goods at prices even lower than some of the smaller manufacturers could sell to their wholesalers. On this same date (**) the New York State Association of Wholesalers wrote the Plumbing Fixture Code Authority complaining seriously about the price situation and placing the blame on the mail order houses. This Association felt that the industry should:

> "be declared in state of acute emergency and that the Government should be appealed to for an investigation of the deplorable conditions whereby manufacturers long since insolvent seem bent on dragging the remaining solvent firms down to their level of insolvency and that the sinister influences exercised by large retailers in an effort to constantly buy from manufacturers be treated with.....
>
> "The wholesale Division, finding it impossible to obtain a Code of Fair Competition is helpless to offer organized cooperation with your Code Authority. The Plumbing Fixture Code is held up to complete ridicule through lack of enforcement of the provisions of the Code designed to make competition fair. Mail order houses, department stores, owned and operated by mail order houses, direct-to-you firms, wholesale hardware houses, purchasing service companies, etc., constantly publish and advertise selling prices because of preferential costs, below the wholesale level, enabling them to undersell any and all true wholesalers. Discrimination is rampant. The Distributive Division of this industry which built up, over the years, the wholesale outlet on a nationwide scale for Sanitary

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(*) Administration Member Rep. No. 6

(**) Administration Member Rep. No. 9

Plumbing Fixtures stands at this time, in a state of rapid liquidation." (*)

Apparently the price cutting was not done altogether through the periodical mail order catalogs. In fact, more frequently the price changes were local, heralded by advertisements in the local newspapers. For example, Mr. George Hoffman, who represented the Crane Company on the Code Authority, wrote to Assistant Deputy Pilkington on August 22, 1934, as follows:

"I am in receipt of a copy of an advertisement appearing in the 'Post-Standard' of Syracuse of Friday, August 17th, in which _____ offer a complete three-piece bathroom outfit, without indicating the size of the bathtub or the size of the lavatory, at $34.95, and they state that the value is $54.50. The ad also states that only five short months ago this high quality sold for $44.95. This is most unusual advertising and it offers the products of the manufacturers whose goods they are advertising at prices lower than any known current price sheet of a manufacturer which may be filed with the Code Authority.

"It is possible that they may have had this material on hand, and it is more than likely that they are still buying it currently on a contract at lower prices than the current published prices of the manufacturer or manufacturers who may be supplying material.

"To enable other retailers to approximate these prices to the consumer, it will be necessary for all manufacturers to materially reduce their published prices, which will result in further losses, and perhaps reductions in labor.

"Unless mail order houses who are competitors of wholesalers and Plumbing Contractors through whom we distribute, are compelled to comply with a Code of Fair Competition, the NRA will fail in its expressed program to prevent the destruction of small industry. By selling at a lower price than any other manufacturer or any other outlet, it is a logical conclusion that _____will become a monopoly, and something should be done to get some constructive contribution from the mail order houses toward the carrying out of the expressed purposes of the President's Reemployment Agreement and the NIRA. Just who can set up the proper investigation of the mail order tactics?"(**)

(*) Letter of July 18, 1934 to Plumbing Fixtures Code Authority - the Code Authority Secretary sent copies of the letter with a covering Bulletin to all members of the Plumbing Fixtures Industry. Code Authority Bulletin of August 3, 1934. Code History, Exhibit P.

(**) Code History, Special Exhibit No.IV. Similar advertisements appearing in New Orleans and in Jacksonville papers were enclosed with letters from other members of the industry. See also Item 12 (a) of Administration Member Report No. 13, December 11, 1934, in which the variation in mail order prices was said to be such as to make impractical the publishing of suggested consumer prices by industry members.

The 1934 Fall Catalogs of the mail order houses made these local reductions general. One company mailed to the Administration Member a copy of a notice appearing in the Sears, Roebuck Fall Catalog, in which the mail order house called attention to the price decreases in many lines of goods appearing in the catalog, which were made at the possible sacrifice of profit, and "despite advances in raw materials, wage rates, and increased expense in practically every direction." As the principal reason for such a policy, the company cited the decreases in income of many of its customers in the drought area, and its wish to cooperate with the Federal Government's efforts to bring about national recovery.(*)

Possibly the most important effect of the price decline led by mail order houses was the almost immediate decision of Standard Sanitary Manufacturing Company to meet the mail order prices. While the Actions of the mail order houses were serious enough, their competition was not very important in many areas, particularly in the urban communities in the North. When Standard determined to meet the prices, however, every company in the industry was affected.

Another effect of the price decreases was to convince many members that the companies selling to mail order houses were doing so both below their filed prices and below their individual costs. (The cost system, although approved, was not in effect.) Since the manufacturers were not responsible for the actions of their mail order house distributors, an automatic finding of guilt against the manufacturers was impossible. What was possible, however, was to strengthen the demand for the filing of mail order contracts and also to canvass the possibilites of a declaration of an emergency and the fixing of wholesale and retail price levels.(**)

2. The Part Played by Standard Sanitary

Every evidence points to the fact that Standard Sanitary Manufacturing Company was the price leader in the industry during the code period just as it had been for years before NRA.(***) It was the company's contention, however, when starting its move to meet mail order prices, that it was the smaller manufacturers who set the prices for the industry because these small companies sold to mail order houses. In other words, Standard felt called on to meet the mail order prices in order not to lose its position in the industry. As expressed by one member of the Industry:

(*) Sheet attached to Administration Report No.10, August 28,1934. The Administration Member indicated in his report No. 13, of December 11, 1934, that Code Authority Members expected the mail order catalogs of February, 1935 to show still further decreases in plumbing goods prices.

(**) See letter of Westcoast Sanitary Manufacturing Co. to Administration Member Clay, Aug. 21, 1934, enclosed with Administration Member Report No.10. See also comments of Clay on mail order house price situation in his reports Nos. 9-13.

(***)See the previous section on Standard Sanitary in the treatment of the Plumbing Fixtures Industry background. Numerous letters to the Administrator during the code period testified to the continued leadership.

"The trouble with Standard is that regardless of conditions they have always upset the market by price cutting when they felt that they were not getting their share of the business available. They refuse to recognize that in times of depression people buy as cheaply as possible so in the case of plumbing fixtures they purchase them from the catalog and the direct-to-you houses and in most cases do their own installation work. This gives these sources of supply a larger share of the small volume of business available than under normal times when Standard, Crane and Kohler do an enormous volume on specified work. At the present time, and for the past three years, there has been very little specified work so the volume of the Big Three has suffered." (*)

The letter went on to say that Standard cut the price in May approximately 15% and pointed out that this did not increase the volume of business "one penny."

"As a matter of fact, there was an immediate recession of orders because buyers do not purchase on a falling market. The only effect of the cut in price, was therefore, to reduce the income of all vitreous china plumbing fixture manufacturers by 15%, which immediately presented a serious problem for the smaller manufacturers who, even before the cut in price, were just managing to get an even break."(**)

Standard Sanitary made its first important price cut of the code period in May, 1934. At approximately the same time the company's representative on the Code Authority, Mr. H.M. Reed, withdrew from that body, his letter of resignation indicating Standard's general dissatisfaction with what was termed the refusal of NRA to enforce the provisions of the Plumbing Fixtures Code as it applied to mail order houses.(***)

(*) Letter to Acting Division Administrator Barton W. Murray, July 25, 1934. Code History, Special Exhibit, Volume V.

(**) Ibid. Note here that the writer of the letter and Standard are not using the term "smaller manufacturers" in the same sense. To Standard all other members of the industry, except possibly Crane and Kohler, are the "smaller" companies, some of whom have mail order contracts. As a matter of fact it was those companies immediately next to the "Big Three" in point of volume of production and size who sold to mail order houses. There were other manufacturers still smaller, of whom the writer was speaking. These, the third group in point of size, were caught between the other two groups during the code period.

(***) H. M. Reed, letters to Secretary R. K. Hanson and to Walter Kohler, Chairman of the Code Authority, May 16, 1934. Code History, Special Exhibit, Volume IV.

In September, Standard effected another price cut, said by competitors to be about 20%, to meet the prices appearing in the mail order house fall catalogs. The largest price changes were made in the faster selling items, which were directly competitive with the articles sold by mail order houses. Because of statements resembling very closely those in the Sears, Roebuck announcement, Standard's "Notice to the Jobbing Trade of September 15, 1934 is reproduced here:

"To the Jobbing Trade:

"For a great many years the distribution of Plumbing Fixtures has been drifting - conflicting methods interfering one with the other.

"In the face of existing divergent opinions, this Company still believes in maintaining the long established practice of selling to the consumer through regular channels; namely, manufacturer to wholesaler to plumber. Toward the end of further strengthening this distributive chain, we now offer a change in the manner of pricing "Standard" Plumbing Fixtures.

"Effective at the close of business September 15, 1934, the following enclosed Price Books reflecting Trade Costs will apply:

ET-1, dated September 17, 1934, covering "Standard" Enamel Ware.
VT-1, dated September 17, 1934, covering "Standard" Vitreous China Ware.
KT-1, dated September 17, 1934, covering "Standard" Brass Goods

"Wholesalers' discounts from the above are as follows:

Non-underlined items - - - - -20%
Underlined items - - - - - - -25%

"Items purchased for Showroom Display purposes are subject to a further 20% discount as outlined in Bulletin Q-796, dated March 9, 1934.

"Freight allowances are as set forth in Freight Allowance Sheet FA-2, attached.

"Credit Terms remain as outlined in Treasury Department bulletin letter of March 2, 1934.

"All previous prices are withdrawn.

"Prices subject to change without notice.

"Our practice of publishing consumer lists has been discontinued. Wherever such lists may be required, it is our recommendation that you cooperate with your plumbing dealers in arranging suggested consumer resale prices which will compare favorably with plumbing fixture prices being offered in your territory. Prices displayed in Showrooms should be on that basis.

"A study of these Price Books will convince you that, under this new plan of action, we make it possible for you to offer the consuming public nationally advertised and universally accepted "Standard" Plumbing Fixtures, with continued unmatched service during construction and thereafter, at prices comparable, quality considered, with those of other channels.

"In compiling these Trade prices, manufacturing costs, administrative overheads, etc., have been disregarded, profits sacrificed, and only consumers' present ability to purchase, considered. Despite advances in raw materials, labor, and increasing expenses in every department of operation, you will note that prices in these sheets are generally lower.

"We have been cooperating fully with the Federal Government in its National Recovery Program. As this letter goes out to you, daily momentum is being gained in the Better Housing Program of of the Federal Housing Administration. Our announcement is opportune.

ST NDARD SANITARY MFG. CO."

The direct results of these price cuts were considerably more far reaching than those attendant upon the mail order prices. Standard was the price leader and its products were sold everywhere. Furthermore Standard filed the downward revisions with the Code Authority. Reaction was immediate and universal. It was a case of meeting those prices or going out of business, and not infrequently the former led to the latter.

One of two members vainly attempted to use code means to stop the landslide. Complaints of selling below cost were filed against Standard with the NRA. But as the company pointed out, Standard was meeting price competition and this was permitted by the code (in a most ambiguous sentence); and besides, the industry's cost system did not become effective until September 29, 1934 and it was never really put into operation by the Code Authority.(*)

(*) See correspondence between Standard Sanitary and Assistant Deputy Pilkington from September 24, 1934 through October 12, 1934 and between Pilkington and Assistant Counsel J.W. Swift of November 17 and December 13, 1934 - Code History, Special Exhibit, Vol. IV.

3. The End of the Trade Practice Provisions

When Assistant Deputy Pilkington was placed in charge of the Code he proceeded to send a letter to every member of the industry (September 10, 1934), asking the question whether or not the Code was satisfactory and what changes the member might suggest, if any. The reception accorded this inquiry was startling even to those who had been convinced the Code could not work. As tabulated and classified by the Assistant Deputy himself the replies shown the following results:(*)

Specific Complaints Against the Code	44 Letters
No Enforcement	18 "
Code Satisfactory as Written	17 "
Replies Valueless	16 "

The complaints emphasized the belief that small producers were at a disadvantage under the code:

> "The Code price structure as it is written is unworkable and does not permit the small manufacturers, making only one line, to exist. The small manufacturer of a single line, such as ourselves and numberous others, must have a concession in price because we cannot render the service to the jobber that the large manufacturer, making all of the fixtures lines, including pottery, brass, enameled ware, etc., can give. To wit, in the city of Pittsburgh, the Kohler Company who make a complete line of enameled ware, pottery, brass, boilers, radiation, etc., have one distributor, who is their exclusive agent. The Kohler Company, at their own expense, maintain a show room and a crew of men to call on the architects, owners and contractors and all jobs taken or promoted by these men are passed on to their wholesaler at no expense to him. The single line manufacturer could not afford the expense of this show room and promotion work, etc., so to offset that with the dealer he must permit the dealer to buy his product at a less price. Another example is the Crane Company or the Standard Sanitary Manufacturing Company, who own their wholesale branches and distribute through those branches. There is nothing that prevents these branches from selling goods at any price that they wish, while the independent manufacturer can only sell to his wholesaler at his published price. Presumably the Standard Sanitary Mfg. Co., or the Crane Company sell to their own branches at their published price but their branches can dispose of the material at any price they wish, even at a loss below their cost, because, of course, it only comes out on one pocket in the end. So that the entire set-up is false and unworkable from any price standpoint and if continued will eliminate every independent manufacturer in the industry.(**)

(*) See memorandum of A. G. Pillington inside the cover of Special Exhibit, Volume I of the Code History -210 companies canvassed.

"Since the operation of the Code, and our strict compliance, this department has graudually lost sales. We maintained our laborers and mechanics in the Foundry and Cast Iron Division principally to hold the employees that had been working for us faithfully for the last twelve years in this department. But during September the major company that has always dictated the price situation throughout the country put in a drastic drop of 20%. We believe this drop was entirely vindictive and put into effect to take advantage of the times and reduce the independent manufacturers to the state where it would be a question of closing down entirely or sustaining such a loss that their position, weakened by the years of depression, would cause them to be taken out of the picture entirely.

"After operating this foundry here on the Pacific Coast since 1920 and enjoying a nice business up to the year of 1929, we find ourselves in this position of closing down entirely until somehow or at some time cognizance will be taken by the Government of the fact that the entire industry is dominated and ruled by one, two or three major companies. These companies with their tremendous advertising allotment, their numerous warehouses in every State of the Union, their large sales force contacting owners and architects and their actual ownership of wholesale distributors, have placed the independent, who is operating strictly under the Code, at such a disadvantage that it is the writer's belief that this is the end of practically all independent manufacturers of cast iron plumbing ware. The fact is that price setting, publishing of lists, and the terms under the Code that allow freight to any jobbing point in the Union, has placed these major companies in the position to take advantage of their knowledge of the affairs of all independents and enabled them to strike at any time in the lowering and raising of prices." (*)

Armed with these replies, Assistant Deputy Pilkington went to the Code Authority meeting of September 26, 1934, in Chicago and persuaded the Code Authority to hold its next meeting in Washington and listen to the suggestions of NRA representatives in respect to the code. The next two meetings were held in Washington, both attended by the Assistant Deputy and his advisers. In the first, the advisers offered their criticisms of the operation of the code as well as of the provisions included in it and heard the complaints of the Code Authority members against particular companies, the mail order houses, and the Administration. At the second meeting the Consumers' Advisory Board and Research and Planning representatives offered joint specific recommendations for code revision.

(*) Letter dated October 18, 1934, Code History, Volume I, Special Exhibit.

The opinions of the members of the Code Authority were unchanged. They consisted in a desire for immediate enforcement of all the code provisions and for some emergency action by the Administration to check the price war. (*) When it became clear that action of this character could not be secured, the industry requested and obtained deletion of the trade practice provisions of the code.

(*) See Administration Member Reports, Nos. 11, 12 and 13, Code History Exhibit D.

III. SUMMARY

A. Lack Of Information

1. Pre-Code History

The difficulties facing attempts to present any adequate picture of the pre-code era in the plumbing fixtures industry were found to be very great. Statistics of volume, capacity, prices, were inadequate and when available, inconsistent. Numbers of members of the component groups making up the industry, and in fact, what was meant by the plumbing fixtures industry itself, were known only by guess, not infrequently bad guess, within the industry or outside. Discussion of the status of the mail order houses seemed to have been based on a virtual absence of pre-code information and the state of ignorance did not end with approval of the code.

2. Period of Code Negotiation

Difficulties with the code making period were not altogether dissimilar. The NRA Deputy's files very inadequately cover the story. There are other NRA files which should help somewhat, but the major source of information for this stage was, of necessity, not in the written word, but in the oral. It is quite proper to assume that various individuals in and out of the NRA who attended the early code making sessions have personal knowledge about the period. But again this means tapping the minds of these persons, and our investigations did not reach the stage of even making the attempt to use such sources. For all practical purposes our situation in this, as in the pre-code period, is one of inadequate material.

3. Period of Code Operation

Rather generous files exist covering the period of code operations in this industry, including the following:

Code Authority bulletins,

Minutes of Code Authority meetings,

Comparatively full reports from the Administration Member,

Over 100 industry letters in answer to a question from the Deputy Administrator about the operation of the code,

in addition to a multitude of briefs from interested parties, a few price filings, lists of wholesale customers, voluminous correspondence about certain compliance cases, complaint letters, etc. It would still be presumptuous to boast of the material's adequacy. The story of the industry at best can only be partly told, but enough material is available to paint in the outline without the detail, although there is some detail without certainty as to its meaning.

But in spite of inadequacies of material and of the coverage of material, there is no reason for hesitancy in painting the picture that impressed itself on all the NRA representatives who came into contact with the Plumbing Fixtures Code. In brief, this tells a story of the breakdown of attempted market and price stabilization through regulation of the channels of distribution and other restrictive but impractical devices.

B. The Combination of Code Trade Practice Provisions

The particular set of code provisions under consideration were numerous and comprehensive and for purposes of discussion to follow have been paraphrased immediately below:

Article VIII, Sec. 7 -

Defines the wholesaling function - buying and assembling at wholesale, selling retailers or retail division of own business, proper investment, adequate showroom and warehouse.

Manufacturer may sell on wholesale purchase price level only to individual performing wholesaling function.

Code Authority, with approval of Administrator may establish a minimum differential to apply between the wholesaler's discount and the retailer's discount.

Manufacturers subject to the code may be sold at better than the wholesaler purchase price level.

Wholesalers themselves may be given special treatment on the basis of volume of purchases or any other basis as specified in the published prices, such treatment not to exceed 5% beyond the net price for the wholesaler level.

No manufacturer may sell industry products to anyone other than for resale (except to employees).

Article VII, Sec. 1

Prohibition of discrimination in prices, terms, discounts, etc., between purchasers of the same class, except as provided in Article VIII, Sec. 7.

Article VIII, Sec. 7

Manufacturer must file with Code Authority the names of customers sold on cash level, the schedule of special discounts and such other information as the Code Authority may require.

Code Authority has the right to examine and challenge a particular classification and may require manufacturer to sell the customer on a proper level as defined in this Section.

A manufacturer engaged in more than one level of business must segregate the levels and keep separate accounts for each "in accordance with the respective codes for the various levels of the industry."

Each manufacturer must publish and distribute a suggested fair price list for sales to the consumer.

Article VIII, Sec. 8

No sales below individual cost, as determined by uniform cost accounting system, except to meet competition on a specific job or order.

Article VIII, Sec. 9

No manufacturer may give terms or showroom discounts more favorable than those established by the Code Authority.

Article VIII, Sec. 10

Each manufacturer must publish and distribute among each class and file with the Code Authority prices for each class of trade to whom he sells. All such lists, except the special discount lists, to be distributed to all manufacturers by the Code Authority.

No manufacturer may sell at other than his filed price except to meet the price of a competitor selling below his own published prices.

Article VII, Sec. 2

Prohibition of secret rebates.

Article VII, Sec. 6

Prohibition of lump sum bidding.

Article VIII, Sec. 1

Regulation of stock and of specific job orders. Thirty day limit for price on orders for stock.

Article VIII, Sec. 6

Prohibition of consignment, all existing consignments to be liquidated within 90 days.

Article VIII, Sec. 3

Uniform grading rules to be established subject to review by the Administrator.

Article VIII, Sec. 1

Prohibition of the sale of other than first grade products in the United States.

Uniform product guarantee to be specified by Code Authority.

Article VII, Sec. 15

Prohibition of sales to used fixture dealers.

The regulations listed above seem to thoroughly cover the additional classification of industry customers with several additional flourishes, such as the prohibition of all but first grade products to take care of a particular industry situation, an open price system, prohibition of sales below cost, and mandatory filing of certain contracts to provide easy checking by the Code Authority of any deviations from the customer classification regulations. The cost and price filing systems had been expected to provide a cost floor and medium for control of certain elements of the price. This is a well-knit system even by itself, but when taken in conjunction with the codes for the other two levels of the business (wholesaling, plumbing contracting), which we have not discussed in this report, one can get a view of the entire mold into which all industry business was to be poured. Such a picture of efficiency in channelization as presented by the code provisions gives no clue as to the actual operation of such a system. No one outside of the code could have foreseen the debacle that took place.

C. Operation of the Code

1. The Extent of Diversity in Product and Distribution

Charges and countercharges by all the parties concerned in this code breakdown have tended to over-emphasize a few important elements, principally the problems of the mail order houses and the sale of seconds. Over-emphasis upon these two important developments has concealed the diversity of the other influences at work. The industry's complexity was such that an effective program for the control of distribution was almost impossible.

The plumbing fixtures industry is of medium size when considered on the basis of number of members. When all product branches were taken into account, probably there were between 200 and 300 concerns operating in 1929, but this is a liberal estimate. The members of the industry are so-called only because they make a product or part of a product which plays a particular part in the water and drainage system of a building. The pre-code history of the industry has indicated how diverse are the products, both in process of manufacture and in principal

raw materials used, and how the branches of the industry are as far apart in organization as in products. (No explanation has been seen of the fact that R. K. Hanson was secretary of four associations after their organization in 1933). Each branch was shown to have a distinct pre-code history, and when it came time for the formation of an NRA code, only the manufacturers of products which they themselves termed "simple plumbing fixtures" were able to meet and present a code.

Two branches of staple fixtures had rather similar pre-code histories, namely, cast iron enamel ware and the vitreous china ware, and these two constituted the backbone of the code. At least one kind of staple fixtures was omitted from the code, namely, staple porcelain fixtures. The brass manufacturers were split, some coming under the code, some hanging on the edge, and some omitted. One group making boilers was admitted, others were left out and formed codes of their own. Still other groups who manufactured what the code members themselves admitted to be fixtures, some of whom were competitors of manufacturers in the code, were excluded altogether. Other differences between the industries were apparent throughout the code and these also have been indicated in the preceding sections.

The 300 odd members of the industry were hardly comparable as to size and degree of product coverage. Some manufacturers were important factors in several lines of plumbing fixtures, some were important in only one line with or without interests in industries outside of plumbing, and there were all kinds of other combinations.

The history of the code-making period, as well as that of the pre-code era, indicated that there were several methods of distributing the products of the industries to the consumers. The so-called traditional method involved the fixture manufacturer, the plumbing wholesaler and the plumbing contractor as separate but requisite links in the chain from manufacturer to consumer. Several groups in the industry made attempts in the past to preserve this form of distribution. Following 1928 a new type of outlet became important. Several of the large manufacturers began buying up distributors and established these as wholesale branch houses. For one company, Crane, the branch houses have almost completely taken the place of the independent wholesalers, although the master plumbers still hold a position in the scheme. Another system of distribution included the manufacturer to mail order house or "direct-to-you" house to consumer, with the master plumber still not infrequently performing a function of installing the ware.

The code-making negotiations after the proposed code reached the NRA, developed into open warfare, with manufacturers resisting attempts to be influenced by the plumbing wholesalers, master plumbers, mail order houses and "direct-to-you's." Some of the manufacturers were definitely arrayed with the mail order and "direct-to-you's" but the principal personalities among the manufacturers, presidents of Kohler, Crane, and Standard Sanitary, respectively, were of one mind, namely, that the mail-order houses and forms of distribution other than the manufacturer-wholesaler-master plumber channel were interlopers. Throughout the whole period, both before and during the code, these larger manufacturers arrayed themselves with the traditional scheme mentioned above, although

two of them depended on their own branch houses in place of the independent wholesalers. All expressions of opinion on the subject were intended to convey the idea that the branch house and the plumbing wholesaler were comparable, and provisions were written into the code in order to make it possible for them to exist side by side without friction. The idea of the wholesaler-retailer differential was to guarantee the independent wholesalers that the manufacturers would not cut the wholesale prices in selling to retailers. The requirement that the levels of business participated in by any one company be kept distinct with separate accounting as provided in the codes for the other levels pointed in the same direction.

There was pressure by wholesalers and by plumbers, however, directed at tightening the tripartite distribution scheme. Wholesalers demanded that manufacturers refrain from selling direct to master plumbers or to retailers of any kind. This proposition the manufacturers refused, but provided the differential mentioned above.

The plumbers wanted it definitely understood that mail order houses were not to get wholesalers' prices and offered a code provision classifying the channels of trade in such a way as to make mail order houses retailers. The manufacturers went as far as they could along this line, but were willing to take the position that if mail order houses departmentalized their business, they might be sold on the wholesale level. In which case, of course, the mail order houses would be subject to the wholesalers code, from which much good was expected. This belief of the manufacturers took final form in paragraph three of the famous Section 7. The stay on the second paragraph of the section, the first part of the definition of a wholesalers, was by no fault of the manufacturers but was through direct mail order pressure on the Administration. The burden of the mail order fight, according to Pilkington, was carried by the mail order houses rather than by the manufacturers supplying them, of which manufacturers there were two on the joint code committee (Held of Rundle Mfg. and McAfee of Universal Sanitary). The manufacturers and plumbers agreed successfully on another point, however, namely, the prohibition of sales to consumers.

What records there are of the code making period give very little indication of the stresses existing underneath the primary fight on distribution. Objections to the various code provisions by manufacturers were not numerous, partly because many members of the industry had given the joint code committee all power to make revisions, after the associations in session had approved the original proposed code of July 25, 1933. Whatever objections were made seemed to have been glossed over.

From the storm which blew up shortly after the code was set in operation and which became thicker and thicker as time went on, one wonders how a code was ever approved for this industry. The divergence of selling methods which appeared when an attempt was made to channelize the distribution of products made the thesis of manufacturer to wholesaler to plumber seem idealistc and illusory. The breakdown that took place also showed very clearly the dependence of the various provisions on each other.

In the first two meetings of the Code Authority (February 14-15, February 28 and March 1) practically all of the code provisions which required Code Authority action in order to be put into effect were acted upon.

(a) The cost accounting system, already partly formulated, was discussed and revised.

(b) Ernst & Ernst were employed to determine on a minimum wholesaler-retailer differential.

(c) The associations were asked to send out calls for price filings, statistics, facsimiles of trade-marks, copies of consignment contracts which could not be terminated in 60 days.

(d) Maximum cash terms were decided on.

(e) Showroom discount was established.

(f) A call was issued for names of customers on the wholesale purchase price level and names of customers receiving special discounts, with the amounts of such discounts.

(g) A call was issued for all sales contracts in effect March 1 and extending for more than 30 days.

(h) A committee was created to draft a suggested Future Delivery Contract Form, etc.

(i) It was decided to make the Bureau of Standards Bulletin CS 20-30 the grading standard.

2. Mail Order Contracts

By the third meeting the Rundle Mfg. Co. had refused to file lists of customers obtaining the special discounts. A little later five other companies refused to file such lists. In addition all six of them refused to file copies of their sales contracts still in effect, their consignment contracts, etc. Complaints were filed with the NRA against the six. Shortly afterward several other manufacturers took the same position, and the whole group, with the exception of three of the companies which terminated their mail order contracts, were found in non-compliance by the NRA and remained in this state for the duration of the code.

The contracts themselves were "cost-plus" arrangements, in which the manufacturer sold to the mail order house at his wholesaler's price but at the end of six months determined the net cost of the article on the basis of the volume purchased during the period and rebated to the mail order house the difference between the wholesaler's price and his cost plus a margin established in the contract. Probably the ultimate prices were better than the maximum discount off the wholesaler's price would permit. Whatever the arrangements, the mail order houses refused to

allow manufacturers to disclose the contracts to anyone. And even without such a prohibition, as one company expressed it, the publication of the contract terms might wreck the market for plumbing goods. Undoubtedly wholesalers would have demanded equal treatment; and since each one of the mail order suppliers had to depend on the regular channels for a proportion of his output (40% or more), these concerns would not have been able to refrain from making the cut more general.

Of course, this discussion is on the assumption that the mail order houses were getting prices better than anyone else and better than the 5% off the wholesalers' price. If the prices had been published, on this same assumption, producers granting these prices would have been in a state of non-compliance. There is, then, considerable question as to whether or not it would have been better for the industry if the contracts had been made public.

The minutes of the meetings record the fact that at one time some of these contracts were filed "confidentially and personally" with the Secretary of the Code Authority, but the Code Authority sent them back with the words that the contracts were unacceptable under those conditions. A test case on the contracts was taken into the Milwaukee Federal Court and heard July 21, 1934, but there was no decision on the matter before the Schechter decision.

3. Sales Between Manufacturers

Meanwhile the code ranks were splitting on various other fronts. The combinations of customer classification, set differentials, and the price filing system were meeting innumerable obstacles. The code mentioned sales to manufacturers subject to the code and exempted them from the wholesalers list and 5% discount. In other words, manufacturers subject to the code could be sold by other code members on any price level they desired. But shortly it was found necessary to decide whether such manufacturers sales were subject to the other code provisions, and the Code Authority further took it upon itself to subdivide manufacturers subject to the code, to say nothing of other manufacturers not subject to the code. The brass manufacturers frequently sold articles that were used as parts of fixtures, and they wanted to be able to sell such parts without the heavy hand of the code rules and regulations on them. One of the complaining manufacturers felt it was impossible to file prices for such sales, because they were in the nature of individual orders.

4. Effects of the Open Price System

Several manufacturers refused to file their retail prices until such time as the Plumbing Wholesalers Code was approved. One company, John Douglas, was granted an exemption from such filings, as well as from the prohibition of lump sum bidding, on the basis that the company did 95% of its business with retailers and that until the approval of the wholesalers' code (in which there were provisions analogous to the two under discussion) it could not meet wholesalers' competition. The granting of an exemption in this case was a particularly sore point with the Code Authority, which said that it had not been consulted on

the matter before the administrative act. The record refutes the Code Authority's contention, but nevertheless the case was used as an example of the arbitrary nature of NRA administrative procedure.

The first price filings collected by the Code Authority were not sent out to members of the industry because not all companies had filed. Very shortly, however, the Code Authority decided to send the filed prices out, but only to those industry members who had done the filing. One almost immediate effect of the distribution was to bring letters from the smaller members of the industry complaining that their so-called "spot" had been wiped out. It seems that it had been customary in the industry over the past five to ten years for the smaller member to "spot" the larger members of the industry 5%. Just who were included among the smaller members is not known, but these companies found that in attempting to reach the wholesale market they were particularly handicapped by the national advertising and consumer acceptance of the products of the "big three." Hence in order to attract wholesalers the smaller companies offered their wares at 5% below the prices made by the large companies.

When the code open price system came along, the large manufacturer, who up to the time of the code had tolerated the "spot," decided they had to meet the prices of all competitors. Consequently, the "spot" was wiped out. Furthermore, an ironical aspect of the situation was that the smaller manufacturers had supposed that the 5% off the wholesale level appearing in the fifth paragraph of Section 7 of Article VIII, was their "spot." Several of the companies wrote complaining about the competition and asking for a guarantee. The larger companies in effect replied that the smaller companies had been guilty of too many unfair practices.

5. Complaints Against Large Manufacturers

There were other complaints about the large companies. Several companies wrote refusing to file their lists of wholesalers. One company wrote to the NRA as follows:

> "With reference to your letter of the 11th ---, wish to advise that we cannot approve of the Code as written, as it requires filing a list of customers, which we feel we are unable to do as it has required considerable effort on our part in the past twenty-five years to acquire customers."

Another company complained that the large manufacturers had either acquired or had entered into exclusive selling arrangements with the largest wholesalers in each territory and it was very difficult to get anyone to handle the company's line; and that whatever distributors it had were ruled off the wholesale list by the Code Authority because they were not thought to fit the code definition.

There was another complaint, namely, that the larger manufacturers were absorbing freight to all parts of the country. Several companies on the West Coast had complained about this competition. They had

[illegible] enjoyed a freight differential and insisted that their costs on the coast necessitated such a differential.

6. Prohibition of the Sale of "Seconds" and the Kokema Case

Several companies, including Mansfield Sanitary Pottery, Bowers Pottery, and Fords Porcelain Co., had complained about the prohibition of all but first grade ware appearing in the proposed code, and so had the Research and Planning Division. When the code was approved these three companies seemingly complied, but a fourth company did not.

As indicated in the pre-code history, the enamelware industry had attempted, between 1910 and 1912, the elimination of the sale of second grade ware caused by defective enameling. The problem was largely a competitive one. The sale of off grade ware could be made at a differential below first grade ware and thus upset the market for products on which the new enameling process was being used. As it happens, no seconds in cast iron enamel ware are now sold, both because of the complete utilization of the newer process as well as because enamelware with cracked enamel is not safe over a period of time.

There are still two distinct methods of producing vitreous china, however, in one of which it is impossible to keep from producing from 10 to 25 per cent second grade ware. The larger manufacturers all employ the newer type of kilns, which necessitate about 5% culls or second grade ware. In cooperation with the industry, the National Bureau of Standards worked out a standard for the product to aid in the grading of first, second and third grades. Both first and second grades are useful and perfectly safe, and the Bureau of Standards publication says nothing about their prohibition. Prohibition was involved, however, when the Code Authority decreed CS 20-30, the government publication, as the standard for eliminating seconds. The reason for ruling out seconds was again largely a competitive one. True, distributors not infrequently mixed firsts and seconds, and since the mark identifying the latter was never widely understood, consumers did not know what they were getting. But even with this element in mind, the important consideration was something else, namely, to eliminate a product that competed successfully with cast iron enamel ware (which sold below vitreous china) and which was also deemed to have an effect on first grade vitreous ware. Another consideration was that the price filing and costing provisions of the code could not operate as easily, if seconds, as well as firsts, were put on the market; it was altogether too difficult to maintain a differential between them.

Some time in the early part of 1934 the Kokema Sanitary Pottery Co. began producing seconds in great quantities and depressing the market for plumbing fixtures in the Chicago area. The Code Authority filed a complaint with NRA. After some deliberation the NRA found Kokema in violation of the code, removed the company's Blue Eagle, and turned the case over to the Litigation Division. The company admitted selling seconds but continued to sell them. The Litigation Division found the Code Authority delinquent in not submitting the official standard to the NRA for approval, as this was required by the code provision, and not

only refused to prosecute, but ordered the Blue Eagle returned to the company. Meanwhile support of the original Research and Planning stand had increased within the NRA, and the prohibition in the code was deemed to be an unenforceable boycott provision. Representatives of the Code Authority, called into conference with the Division Administrator, finally decided to ask for grading standards allowing each member of the industry to do his own grading. Still later the Code Authority and the Vitreous China Association decided to work toward a code amendment providing for a clear labeling of cull ware rather than its complete prohibition.

7. Dissatisfaction of the Brass and Seat Manufacturers

Another rather important code restriction was that prohibiting sales to anyone other than for resale. The brass manufacturers in general were very much concerned about this restriction. Many of them who may not have sold original products direct had sold repair and replacement parts direct to consumers. A considerable amount of discussion was caused by the matter and the Code Authority went to the length of requesting from the NRA a stay of the provision as it applied to the sale of repair and replacement parts. Unfortunately this became involved in the general move for code amendments and was never acted upon. Several brass manufacturers also preferred a quantity discount system to trade discounts.

The seat manufacturers were not at all satisfied with the prescribed classification of customers. They wanted to give the manufacturers, who bought seats for their closet bowls, special prices and special terms. Furthermore, they wanted to have department stores and retail hardware dealers classified as wholesalers, because the two latter groups were their greatest distributor outlets. On several occasions the seat manufacturers threatened to leave the code entirely and join in a proposed Woodworking Code. They considered the trade practice provisions of the Plumbing Fixtures Code definitely harmful to their interests.

8. The Rates of the Wholesaler-Retailer Differential and of the Cost System

There has been no previous discussion in these conclusions of two other provisions which the Code Authority in its first meetings began to put into operation. The first of these was the authority to establish, with administrative approval, a minimum differential between the wholesaler and retailer price levels, as provided in the second paragraph of Section 7 of Article VIII. The Code Authority had employed a firm of accountants to compute a reasonable differential. The recommendations of this firm were accepted by the Code Authority and proposed at a public hearing called for the purpose by the NRA. The suggested 20% differential was based on a study of costs of over 100 wholesalers in the central states, members of the Central Supply Association. Unfortunately for the differential, advisers from two divisions, namely, Research and Planning and the Consumers' Advisory Board, were in agreement strongly opposing the recommendation. Office Memorandum 267 was good precedent for a definite position on a subject with as serious

implications for channelizing distribution. This opposition combined with the inadequacy of the original study, was too great an obstacle to approval of the differential. The hearing on the differential brought to light a development in the industry of considerable importance, resulting in the depression of trade discounts. Sometime in 1933 all companies in the industry took to distinguishing in their price lists between fast and slow selling items. During 1934 the discounts on both groups to both wholesalers and retailers declined sharply and practically in unison. At the hearing mentioned above, a representative of the NAMP (the plumbing contractors) objected to the change under the impression that it had been caused through a general misunderstanding of the effect of a minimum differential. The facts indicate otherwise, however, and seem to point toward an agreement under Standard's leadership to reduce discounts along with manufacturers' net returns on plumbing fixtures. In other words it was an accompaniment to the price decline necessitated by attempting to meet mail order prices to consumers.

The cost accounting system for the industry was approved on September 14, 1934, effective on the 29th, but was never put into effect largely because of the prediction made by representatives of the NRA at a meeting with the Code Authority on October 17, 1934, that a cost system combined with the code prohibition of sales below cost could do nothing more than stabilize prices at the level of the lowest cost individual. Toward the end of the year, Governor Kohler conceived the plan of using the cost system to determine costs within a few sample companies, making a composite out of the costs and publishing this to the industry as a suggested level. The sample firms were picked and some work on it was done by the same firm which had performed the original job, namely, Ernst & Ernst, but the code trade practice provisions were deleted before much was accomplished.

D. The Conclusion to Operation of the Code Trade Practice Provisions.

The foregoing discussion illustrates the diversity of business methods in use in the industry. The Code Authority attempted to enforce the code as they thought it written, with the result that complaints (all but a few were trade practice) had been filed against 77 companies (including duplications) by June, 1934, while approximately 155 companies were in good standing. Another report on September 26th indicated that 156 complaints had been filed and 134 adjusted. The Code Authority said that it could not cite one case of enforced compliance on the part of NRA. By the end of the year, moreover, practically every member of the Code Authority had been accused of non-compliance at one time or another.

Sometime before the end of 1934 the situation in the plumbing fixtures industry had gotten completely out of hand because of a price war, initiated by Sears-Roebuck, but participated in by Standard Sanitary and eventually by everyone still in operation in the industry. In the fall of 1933 and winter of 1933-34 the prices of plumbing fixtures took a sharp rise, very possibly in anticipation of the code. But early in 1934, for reasons unknown, Sears-Roebuck began putting on an extensive advertising campaign and made local price reductions. Standard Sanitary

met the prices and between the two of them the price level became progressively lower. Everyone was obliged to join in or go out of production. As a consequence, by December, 1934, the prices were the lowest they had ever been in the history of the industry, (the decline applied to cast iron enamel ware, vitreous china, and seats), and by July, 1935, they were still lower. By December, 1934, there were only nine enamel ware companies operating, and in vitreous china, fourteen. Whether or not the price war was the result of the code provisions of this industry alone or of all the plumbing codes or of none of them, it is hard to tell.

The combination of circumstances drove the Code Authority to Washington for relief. In two meetings between the latter and representatives of the NRA it was suggested that the trade practice provisions be amended along the lines of existing NRA policy. Finally, in January, 1935, the Code Authority returned with an amendment deleting all code trade practice provisions. This was the end of an attempt at a rigid code control over distributive channels.

APPENDICES

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EXHIBIT NO. 1 - DESCRIPTION OF PROCEDURE

The study was originally conceived as an effort to analyze the experience of the NRA with various types of devices incorporated in codes by manufacturing industries, ostensibly to control the channels through which the products manufactured by them were distributed.

In some instances provision for a device in a code was merely the recognition of an established practice in the industry, while in other instances it was an excursion into a new field of control or an attempt to fortify a newly developed method of distribution. The interest of the study Unit lay in placing in its proper setting each device utilized during the NRA period so that an understanding could be reached concerning the purposes for which such device was used, and the effects of its operation on the manufacturer, the distributor, and the consumer.

Attention was to be directed not only to the provisions appearing in approved codes, but also to the provisions proposed by code proponents but not approved; to the industry history of attempts to control distribution, the development, and the effects on manufactureres and distributors by types and on the public as a consequence of the utilization of such control devices.

The outline of inquiry attached hereto sets forth the questions which it was decided should be answered in connection with the study. It was contemplated that with an adequate staff considerable headway could be made toward the answering of these questions in the time allotted for the study.

The study was focused primarily on the methods or devices by which controls were effected. Certain types of code provisions -- resale price maintenance, customer classification, fixed trade or quantity discounts, etc. -- obviously were to have a direct effect upon distribution. An examination of several hundred manufacturing codes revealed the recurring presence of certain types of provisions which obviously would have some effect on distribution. As a result of such examination it was determined that eleven general types of provisions included at least the more important attempts by manufacturers to control distribution. These eleven types of provisions are enumerated in the outline of inquiry attached hereto.

It was intended that the origin, promulgation and operation of each of these eleven types of provisions should be developed, together with all available information concerning their effects on distribution processes, in each selected industry. The following excerpt from a statement of the objectives of this Study Unit, set forth in a memorandum to the members of the staff of the Unit on September 30, expresses to some extent the objectives of the study as they were then contemplated:

> "We have seen where in the development of commerce certain methods of distributing products have replaced others, and during the period immediately prior to NRA certain types of distributors utilizing one method or plan of distribution were in serious conflict with other

types. In many instances these conflicts and difficulties resulted in serious trouble in the industries involved, affecting not only the distributors but also the manufacturers. It was to meet these difficulties that certain provisions were placed in manufacturing codes. It was the obvious purpose of many of these provisions to modify the position of certain distributors in the total picture of distribution of the product. Either one type of distributor was to be eliminated because it was felt that this type of activity was harmful in the total scheme, or another type was to have his position solidified or strengthened. The interest of this Unit is to determine to what extent these provisions operated to change the relative positions of the different types of distributors appearing in the entire distribution picture. We have accordingly selected the provisions which can be said to have such a purpose as their direct objective, and we wish to develop the facts to prove that these provisions either did or did not have the contemplated results, and if they did not, to develop what the results were."

Following the selection of the types of provisions in which this study was primarily interested, a selection of codes containing these provisions, both singly and in combination with other provisions, was made. Use was made of the post-code analysis studies of the Research and Planning Division of the NRA, and an examination was made of more than 400 codes and supplements. Forty industries were tentatively selected for consideration because of the presence in their codes of provisions, of interest to this Unit or combinations of such provisions, or because of the importance of the industry or code activity in attempted control of distributors or distribution. In this selection care was taken to include codes covering the manufacture of widely varied types of products.

It was recognized, of course, that there was a distinct probability that the staff of this Unit would not be large enough to permit an examination of all of the forty tentatively selected codes. Accordingly, as members reported for work with the Unit they were assigned to those codes which it was believed would be of the most importance and value to the study. In all, work was commenced on only seventeen of the forty tentatively selected codes. Of these seventeen, four were later abandoned because of curtailment of the staff through resignations or staff reductions. Of the remaining thirteen industries reports have been prepared on six namely, Plumbing Fixtures, Salt, Wood Cased Lead Pencil, Value and Fittings, Cork and Asbestos.

On the remaining seven industries, namely, Lumber and Timber Products, Carpet and Rug, Business Furniture, Cement, Funeral Supplies, Agricultural Insecticides and Fungicides, and Fire Extinguishing Appliances the work was not carried forward to the point where a formal report could be made prior to the termination of the employment of the individuals to whom these studies were assigned. In each instance a summary has been prepared based on the information developed by the investigators and contained in the work materials left by them.

As has been indicated, the original conception of this document was a study of devices appearing in manufacturers' codes having the ability or the potential ability to effect a manufacturer control over distribution.

It very soon became evident that each individual device in and of itself meant little except as it was connected with other devices, the total combination of devices comprising the industry or code program. Thus, customer classification by itself could not accomplish any change in distribution or have any effect on distribution unless it were combined with other devices such as price filing, the fixation of discounts to different classes of customers, requirement of resale price maintenance on the part of certain customers, etc.

As the individual studies developed it became increasingly evident that this Unit was concerned more with programs composed of combinations of devices than it was with isolated devices by themselves. In order to understand or evaluate any industry program designed to or actually affecting distribution it was considered necessary to place this program in its proper setting. An understanding must be had of the industry background, previous practices and methods of distribution, distribution trends, and the problems which the industry felt that it must solve, not only with respect to distribution alone, but with respect to other matters not directly related to distribution. Thus the individual studies conducted by the Unit began to take on the aspect of industry studies covering a much wider field than had been originally contemplated. This necessitated references to sources of information outside of the NRA, as well as those within the NRA files. But with one exception no field trips or field investigations were possible and as to each of the industries studied perhaps the greatest difficulty encountered was the lack of complete information, although use was made of the facilities of various government departments, including bureaus of the Departments of Commerce and Labor, the Federal Trade Commission, and the Library of Congress.

C O N F I D E N T I A L

MEMORANDUM TO SECTION HEADS August 8, 1935

SUBJECT: WORK OUTLINE NO. 35

OUTLINE OF STUDY OF TRADE PRACTICE PROVISIONS AFFECTING CHANNELS OF DISTRIBUTION

The following material is presented by the Trade Practice Studies Section after having been edited by the Planning Committee of that Section and approved by Mr. Edwards. The outline is now before me for consideration.

In examining this material, it will be found helpful to examine also Work Outlines Nos. 27, 28, 29, 30, 33 and 34. It is expected that additional outlines will be presented by the Trade Practice Studies Sections dealing with Minimum Prices, Loss Limitation and Coercive Devices.

L. C. Marshall
Director, Division of Review

Outline of Study of Trade Practice Provisions
Affecting Channels of Distribution

This study has been outlined as a study of the effect of trade practice provisions on distribution channels.

Eleven types of trade practice provisions which we believe to be the more important types of provisions affecting channels of distribution have been selected, whether or not such effect was the primary intent of the provisions. A list of these provisions follows:

1. Customer Classifications
2. Resale Price Maintenance
3. Price Differentials
4. Quantity Discounts
5. Loss Limitation
6. Brokerage
7. Restrictions on sales to certain classes or types of outlets
8. Consignment Selling
9. Discounts other than quantity discounts
10. Restrictions on size of shipments or manner of making shipments
11. Price Discrimination

(It will be observed that open price provisions and various types of minimum price provisions have been omitted, even though they have or may have an appreciable effect on channels of distribution, because they are being studied separately, and such study probably will include an estimate of their effect on distributive channels.)

Each of the provisions listed above appear in a number of different forms or variations. For instance, there are 18 different kinds of customer classification provisions, 14 different kinds of quantity discount provisions, etc.

I. Points of inquiry into trade practice provisions in selected codes

A. By whom proposed and supported

1. Did all members of the industry support the proposal?

(a) If not, what type of member advocated the provision?

(1) Size
(2) Method of channels of distribution

2. Did proposals receive support from persons outside industry?

(a) If so, who?

(1) Characteristics of supporters as to size, buying methods, classification, etc.

B. By whom opposed

1. Opposed by members of the industry?

(a) If so, what type of member?

(1) Size
(2) Method of channel of distribution

2. Opposed by persons or interests outside of industry?

(a) If so, in what capacity

(1) Characteristics of opponents

C. Reasons for, and purpose sought to be accomplished by provision

1. Reasons advanced by proponents

2. Conditions existing in industry on date of proposal (See Appendix)

3. What had been trends in distribution and volume to date of proposal. (See Appendix).

4. Effect of provisions as contemplated by proponents

(a) Stabilization of distributive channels

(1) Protection of certain distributive channels
(2) To eliminate certain distributive channels
(3) To prevent discrimination between distributors
(4) To deprive certain distributors or buyers of advantages over others
(5) To eliminate or reduce dominance of certain distributors over other distributors and over manufacturers.
(6) To restore seller dominance over distributive outlets

(7) To protect manufacturing sales outlets against other types of distributor

(b) Stabilization of prices

(1) To raise price structure generally
(2) To secure price uniformity between manufacturers
(3) To secure price uniformity between distributors
(4) To eliminate price competition between direct sales and those through distributor
(5) To prevent price cutting by certain distributors to detriment of others
(6) To equalize freight differentials and shipping costs to different sections
(7) To assist in establishment of minimum prices
(8) To reduce pressure of distributors for lower prices from manufacturer
(9) To eliminate unwarranted price concessions to certain buyers
(10) To eliminate loss leader selling
(11) To eliminate quantity discounts
(12) To eliminate trade discounts
(13) To reduce cash discounts and restrict credit terms
(14) To establish uniform differentials between classes of buyers

(c) Prevent cheapening of brand name in public mind.

(1) Habit of buying at lower price
(2) Opinion that product is of cheaper quality

(d) Directing competition toward product rather than price

(1) Effect on unknown, little advertised products as contrasted with well known ones

(e) Increase number of distributive outlets

(f) Increase production and distribution of products

(1) Increasing production employment
(2) Increasing employment in distribution

(g) Increase efficiency in distribution of products
(h) Increase cooperation within industry
(i) Necessity in connection with other provisions of code
(j) Necessity in connection with future plans and proposals (uniform contracts, merchandising plans)
(k) Desire for use of provision outside scope of code
(l) Fear of growing power on part of certain distributors
(m) Increase consumer demand and acceptance of product
(n) Prevent changes in methods of distribution

(1) Delay changes until gradual adjustments can be made in industry

D. Effect of provision as contemplated by opponents

1. Freezing or perpetuating long established distributive methods and channels

   (a) Discouraging efficiency in distribution

      (1) Detracting from opportunity to eliminate unnecessary steps
      (2) Tending to increase price spread between manufacturer and consumer

   (b) Hampering progress in distributive methods
   (c) Perpetuating inefficient, high cost distributive system
   (d) Hampering development of new and improved methods

2. Elimination of certain manufacturers

   (a) Small manufacturers
   (b) Unadvertized, little known brands
   (c) Manufacturers using certain distributive channels which would be eliminated or injured

3. Elimination of certain types of distributors

4. Fostering monopoly in a few manufacturers

   (a) Would injure little man

5. Fostering monopoly in a few distributors

6. Discouraging or hampering entrance of new manufacturers in field

7. Discouraging or hampering entrance of new distributors in field

8. Inordinately increasing prices

9. Reducing volume of production

   (a) Reducing employment in production

10. Reducing employment in distribution

11. Hampering individual initiative and efficiency

12. Facilitates price fixing or price control arrangements in industry outside of code.

13. Establishes improper classifications of distributors and buyers.

14. Establishes insufficient price margin or differential for certain distributors

15. Changes established trade practices in industry

16. Deprives certain buyers of advantages to which they consider themselves entitled and which they have received in past

17. Tending to stifle newly developed methods

18. Lessen variety

19. Alter consumer acceptance of brands or products

    (a) Substitutes
    (b) Private brand vs. advertised brand

20. Would work to detriment of certain types of distributors

    (a) Chains
    (b) Cooperatives
    (c) Mail order houses
    (d) Large single store independents
    (e) Small single store independents
    (f) Brokers
    (g) Manufacturers sales branches

E. Positions taken by N.R.A. Advisory Boards and Divisions

1. In favor of provisions

    (a) Reasons and arguments

2. Opposed to provisions

    (a) Reasons and arguments

3. Recommendations for revision or changes in proposals

    (a) Reasons and arguments

4. Position taken by Deputy and his action on proposals

    (a) Revisions made by Deputy

        (1) Reasons assigned therefor

5. Further action taken

    (a) Action of Review, Advisory Council, Administrator

        (1) Further revisions and reasons therefor

6. Provision as approved

F. The provision in operation

1. Administration

9825 (a) Administration by Code Authority

(1) C. A. rulings, releases, bulletins, etc.

a. What controversies and changes were involved?
b. What sanctions were employed in enforcing rulings?

(2) Purpose to which C. A. attempts to direct provisions

a. Authorized
b. Unauthorized

(3) C. A. requests for interpretations, exemptions, rulings, explanations, etc.

a. Reasons therefor

(4) Trade Practice Complaints Committees

a. Method of procedure and activity
b. N.R.A. review

(5) Amendments, revisions and modifications proposed by C. A.

a. Reasons therefor

(6) Manner of handling objections, requests for exemptions, etc., from industry members

(7) Merchandising plans, uniform contracts, etc., proposed by C. A.

(8) Compliance activity of C. A.

a. What type of case was handled?
b. What changes were involved?
c. What was nature of complainant as to size, type of operator, position in the trade, etc.?
d. What was nature of defendent as to size, type of operator, position in the trade, etc.?

(b) Administration by N.R.A.

(1) Interpretations, rulings, explanations, exemptions, etc., considered by N.R.A.

a. What issue was involved?
b. What prior action had been taken by C.A.?
c. At whose instance was question raised?
d. What was attitude of various agencies within N.R.A.?
e. What action was taken?
f. How was this received in the industry?

(2) Same with respect to amendments, revisions, modifications, additions

(3) Same with respect to uniform contracts, merchandising plans, etc.

(4) Stays and other administrative action
(5) Review of C. A. activity, and action relative thereto
(6) Administrative difficulties and problems

a. Solution or action thereon

(7) Compliance activity of N.R.A.

a. What types of cases were handled?
b. What action was taken thereon?

(c) Administration by trade associations and members of industry

(1) Activity of trade association or members of industry in issuing interpretations, urging action under provisions, discussion of provisions in conventions, trade journals, etc.

(2) Did code conform with declaration?

a. If not, were necessary changes made?

(3) What was industry attitude toward declaration?

G. Effect of provisions in operation

1. Changes in methods of operation

(a) What changes did manufacturers have to make in their operation to comply?

2. What changes did distributors have to make in their operation to comply?

(a) Did they make these changes and comply?

3. What new practices appeared as subterfuges or means of evasion?

(a) Was this occasioned by fact that provision did not receive support of industry?
(b) Was this occasioned by fact that provision was poorly or loosely drawn?

4. What changes in buying methods resulted from code provisions?

5. Does evidence indicate that the provision resulted in stabilization of the distributive channels?

(a) By providing protection to certain distributive outlets?
(b) By eliminating certain distributive channels?
(c) By preventing discrimination between distributors?
(d) By depriving certain distributors or buyers of advantages of others?
(e) By eliminating or reducing demands of certain distributors over other distributors and over other manufacturers?
(f) By restoring seller dominance over distributive outlets?
(g) By protecting manufacturing sales outlets against other types of distributors?

6. Does evidence indicate that it stabilized prices?

(a) By raising the price structure generally
(b) By securing price uniformity between manufacturers
(c) By securing price uniformity between distributors
(d) By eliminating price competition between direct sales and those through distributors
(e) By preventing price cutting by certain distribution to the detriment of others
(f) By equalizing freight differentials and shipping costs to different sections
(g) By assisting in establishment of minimum prices
(h) By reducing pressure from distributors for lower prices for manufacturers
(i) By eliminating unwaranted price concessions to certain buyers
(j) By eliminating loss leader selling
(k) By eliminating quantity discounts
(l) By eliminating trade discounts
(m) By reducing cash discounts and restrict credit terms
(n) By establishing uniform differentials between classes of buyers

7. Does evidence indicate that it prevented cheapening of brand name in public mind?

8. Does evidence indicate that it directed competition toward product rather than price?

   (a) Does evidence indicate that it had effect on unknown, little advertised products as contrasted with well known ones?

9. Does evidence indicate that it increased number of independent outlets?

10. Does evidence indicate that it increased production and distribution of products?

    (a) By increasing production employment
    (b) By increasing distribution employment

11. Does evidence indicate that it increased efficiency in distribution of products?

12. Does evidence indicate that it increased cooperation within industry?

13. Does evidence indicate that it was necessary in connection with other provisions in the code?

14. Does evidence indicate that it was necessary in connection with future plans and proposals of the industry?

15. Does evidence indicate that the provision was used outside the scope of the code?

16. Does evidence indicate that there was a growing power on the part of certain distributors and did it materialize?

17. Does evidence indicate that consumer demand and acceptance of the product increased?

18. Does evidence indicate that it prevented changes in methods of distribution?

    (a) By delaying changes until gradual adjustments could be made in the industry?

19. Does evidence indicate that it froze or tended to perpetuate long established distributive methods and channels?

    (a) By discouraging efficiency in distribution

        (1) By detracting from opportunity to eliminate unnecessary steps
        (2) By tending to increase the price spread between manufacturer and consumer
        (3) By perpetuating inefficient, high cost distributive system
        (4) By hampering development of new and improved methods

20. Does evidence indicate that it eliminated certain manufacturers?

    (a) Small manufacturers
    (b) Manufacturers of unadvertised, little known brands
    (c) Manufacturers using certain peculiar distributive channels

21. Does evidence indicate that it eliminated certain types of distributors?

22. Does evidence indicate that it worked to detriment of certain types of distributors?

    (a) Chains
    (b) Cooperatives
    (c) Mail order houses
    (d) Large single store independents
    (e) Small single store independents
    (f) Brokers
    (g) Manufacturers sales branches

23. Does evidence indicate that it fostered monopoly in a few manufacturers?

    (a) By injuring the small manufacturer

24. Does evidence indicate that it fostered monopoly in a few distributors?

25. Does evidence indicate that it discouraged or hampered the entrance of new manufacturers in the field?

26. Does evidence indicate that it discouraged or hampered the entrance of new distributors in the field?

27. Does evidence indicate that it increased price inordinately?

28. Does evidence indicate that it reduced volume of production?

    (a) By reducing production employment

29. Does evidence indicate that it reduced employment in distribution?

30. Does evidence indicate that it hampered individual initiative and efficiency?

31. Does evidence indicate that it facilitated price control arrangements in the industry outside the code?

32. Does evidence indicate that it resulted in the establishment of improper classifications of distributors and buyers?

33. Does evidence indicate that it resulted in the establishment of insufficient price margin or differential for certain distributors?

34. Does evidence indicate that it resulted in changes in established trade practices in the industry?

35. Does evidence indicate that it resulted in certain buyers being deprived of advantages to which they were entitled and had received in the past, or which they considered themselves entitled to receive?

36. Does evidence indicate that it tended to stifle newly developed methods?

37. Does evidence indicate that it tended to lessen variety in products in the industry?

38. Does evidence indicate that it altered consumer acceptance of brands or products?

    (a) Substitutes
    (b) Private brands vs. advertised brands

39. Does evidence indicate that changes took place in total number of distributive outlets?

    (a) By types
    (b) By volume
    (c) In practices

40. Does evidence indicate that changes took place in financial condition of operators?

    (a) Effect on failures in the industry
    (b) Effect on profits in the industry
    (c) Does evidence indicate that these results followed from the provision under consideration or from this provision together with other related provisions?

H. Study of Trade practice provisions related to, or combined with those selected under IV, A, of this outline. Same questions as in Article IV, B, C, D.

I. Study of proposals contained in codes governing the distribution of products coming under the codes selected according to Section III of this outline. Same questions as in B, C, D, E, of Article II.

II. Pre-Code Experience with Regulations of Channels of Distribution

A. Inception of control or device or custom

1. By whom supported

(a) What members of the industry supported the device?

(1) Size
(2) Type of distribution used

(b) Was device given support by persons outside of industry?

(1) Size
(2) Buying methods, classification, etc.

2. By whom opposed or ignored

(a) Members of the industry

(1) Size
(2) Type of distribution used

(b) Persons or interests outside of industry

(1) What interests?
(2) Characteristics, e.g. Size, buying methods, classification

3. Ends sought to be attained by regulation or custom

1-4 (All those inquiries contained in Outline of Study of Trade Practice Provisions affecting Channels of Distribution under Codes in V, C.)

4. Arguments advanced against the device or reasons for non-support

1-20 (All of these inquiries contained in Outline of Study of Trade Practice Provisions affecting Channels of Distribution under Codes in V, D.)

B. The regulation or plan as enacted or agreed upon

C. Agency administering

1. Trade Association

(a) Organization
(b) Procedural set-up

2. Voluntary association

3. Government agency

D. The device in operation

1. Methods of control developed

(a) Dissemination of advice and instructions
(b) Methods of checking on operations of industry members

2. Sanctions used

(a) Legal, where government was administering agency
(b) Extra-Legal, e.g.

(1) Boycott
(2) Blacklist
(3) Moral suasion

3. Difficulties encountered, e.g.

(a) Legal proceedings and their import on the regulation
(b) Effect of doubtful legal status on cooperation of industry members
(c) Inadequacy of administrative check, e.g. lack of access to invoices
(d) Efforts by industry members to break down regulation

(1) Individually
(2) By group action

(e) Efforts of non-members to break down regulation

(1) Distributors

a. Individually
b. By group action

(2) Others

4. Attitudes regarding the regulation

(a) Of industry members
(b) Of non-members

(1) Other distributors
(2) Customers
(3) Government agencies

E. Economic Effects of the Regulation

1-40 (All of those inquiries contained in outline of Study of Trade Practice Provisions affecting Channels of Distribution under Codes in V, G.)

III. Points of Inquiry into Post Code Status of Industry

1. Does evidence indicate that there was a return to pre-code methods?

2. Does evidence indicate that there was a change in volume manufactured?

3. Does evidence indicate that there was a change in volume distributed through various outlets?

4. Does evidence indicate that there was a change in outlets through which volume was handled?

5. Does evidence indicate that new operators entered field of manufacturing or distributing?

   (a) New operators in old types of outlets
   (b) New types of outlets

6. Does evidence indicate that attempts were made to continue operation of former code provisions?

   (a) Success
   (b) Failure
   (c) Reasons

EXHIBIT NO. 2

THE CEMENT INDUSTRY

General Industry Data

According to the Census of Manufactures (1929), the Cement Industry in 1929 consisted of 174 establishments, employing 33,368 wage earners, and with total products valued at $267,509,260. (The NRA code defined the "industry" as including "the manufacture and sale by manufacturers of Portland Cement".)

The following information concerning the firms in the industry will give a "picture" of the composition of the industry: (*)

Table I

Manufacturers Concerned	No. of Mfrs.	No. of Mills	% of Total Capacity	% of Total Production (1929)	% of Total Production (1931)
Five largest	5	59	40.2	37.6	40.4
Six next largest	6	27	15.6	17.0	12.6
16 next largest	16	31	20.0	20.7	18.8
Sub-Total	27	117	75.8	75.3	71.8
50 small mfrs.	50	58	24.2	24.7	28.2
Industry Total	77	175*	100.0	100.0	100.0

*Located in 37 States.

In the early history of the industry, manufacturers had difficulty in overcoming a consumer prejudice in favor of imported cement. In 1878, 78,000 barrels were imported, while in 1891, 3,000,000 barrels (27% of domestic consumption) were imported. However, since 1907, imports have seldom amounted to more than 2% of domestic consumption. (*) Domestic production of cement (natural and Portland) grew from 300,000 barrels in the 10 year period, 1818-1829, to an annual production of 178,000,000 barrels in the peak year, 1928. (*)

The condition of the industry during the past few years is well illustrated by the following figures, showing percentage of production capacity utilized: (*)

(*) "Cement Industry", Federal Trade Commission (1932).

TABLE II

Year	1925	1926	1927	1928	1931	1932	1933 (9 mos.)
% of total capacity utilized	83.5	76.4	76.3	72.3	46.1	28.3	24.7

From 1923 to 1930, 28 new plants were established, 6 as late as 1929. No new plants were established from 1930 to 1934. Thus, the peak of utilization of productive capacity occurred three years prior to the peak of production, due to the later establishment of new plants without adequate foundation in demand. (*)

Trade Associations

Trade associations have played a large part in formulating and carrying out policies with regard to distribution in the Cement Industry. (**) The Cement Manufacturers' Protective Association (organized in 1916, and dissolved in 1924 while its appeal from a dissolution decree against it was pending in the Supreme Court of the United States), provided for the collection and dissemination of information on credits, specific job contracts, production, shipments and stocks of cement; for the maintenance of trade customs and usages; and for the compilation of freight rates from basing points to all delivery points within the territory of its members. (The Supreme Court later ruled that it found no basis for the complaint that the association activities constituted an unlawful restraint of trade - Cement Manufacturers' Protective Association v. U. S., 268 U. S. 588,603.) (**)

The Cement Institute, later the code proponent, was organized in 1929 by practically the same group of men as fostered the earlier organization, and for the same purposes. The Cement Institute, among other things, adopted standard contract forms, guaranteed conformance of members' cement with standard specifications, checked specific jobs, compiled freight rate books, published to the trade changes in price, terms and conditions of sale, and condemned other trade practices, such as price discrimination by secret rebates, gifts, diversion of shipments, etc. The Federal Trade Commission upheld the activities of the Cement Institute as similar to those of the prior association with which the Supreme Court had found no fault. (**) (***)

(*) "The Manufacturing Capacity, Volume and Costs of Portland Cement in the United States", by H. E. Hilts, NRA Research and Planning Division (October 6, 1934).

(**) Senate Document No. 71, 73rd Congress (1933).

(***) "Price Bases Inquiry, The Basing Point Formula and Cement Prices", Federal Trade Commission (1932).

The American Portland Cement Association, organized in 1902, changed its name in 1916 to the "Portland Cement Association". This association has never taken an active part in the formulation of sales or price policies, but has devoted its entire attention to educational research work developing new uses of concrete. (*)

Methods of Distribution

The controversy in the Cement Industry over two types of distribution - direct sales by manufacturers and dealer distribution - extended over a period of several years into the NRA code period, and provides an interesting and informative story.

Portland cement is a perfectly standardized product, manufactured by such an exact chemical formula that the cement of one manufacturer is equal to that of any other for all practical purposes. For years the industry has merchandised on a multiple basing point system which, except for later "leaks" through dealer distribution, permitted the quotation of uniform delivered prices at each point of delivery. Delivered prices have been used in the industry since 1902. (The lowest sum of base price and rail freight rate from the base, all basing points considered, determines the formula delivered price at a given point, the system becoming effective through the simple expedient of making both base prices and freight rates known to the Trade, through association activity. (**) (***)

It is not the purpose of this report to devote much attention to the industry's basing point system, although the following background information may be of interest. That the system goes along with price uniformity is shown by the fact that the Federal Trade Commission found 100% uniformity in manufacturers' invoice to dealers from 1927 to 1929 in 13 cities and almost 100% uniformity in 3 more cities, out of 21 cities surveyed. (***) The Commission also found substantial inflexibility of prices, not more than one or two price changes per year being recorded for certain cities surveyed. (***) Cross-hauling has been recognized by the industry as unsound since 1912, but is considered necessary to sales maintenance and is widely indulged in. The Federal Trade Commission survey of 21 cities determined that only 35% of the sales were made at maximum mill net prices (indicating that the remaining sales were long hauls out of the lowest freight zone.) The Commission further estimated the average unnecessary burden per barrel of cement to be 24.3 cents - for 1927, a total of about $42,000,000, or about 20% of the total production and selling cost. (***) The industry's stated reason for cross-hauling is a "hunger for tonnage", but the Federal Trade Commission felt that it was primarily due to s[illegible]

(*) Senate Document No. 71, 73rd Congress (1933).

(**) "Cement Industry", Federal Trade Commission (1932).

(***) "Price Bases Inquiry, The Basing Point Formula and Cement Prices", Federal Trade Commission (1932).

the successful maintenance of high prices - otherwise manufacturers could not afford the resultant decrease in mill net return. The basing point formula maintains the uniform prices regardless of the distance the goods are shipped. The two ways of breaking down the formula uniform prices are through discounts to dealers (or splitting of discounts by dealers) and diversion of shipments from low to high price areas (which can be prevented by requiring a receipted freight bill from the destination as part payment for the invoice.) (*)

From 1 26 to 1930, manufacturers utilized dealer distribution exclusively, with the exception of sales to the Federal Government, State Governments and railroads, which were sold direct by the manufacturer. (The dealers concerned are all established members of the Building Supply Trade.) The dealer was compensated by a 10 cent per barrel discount, thus maintaining the uniform delivered price in spite of dealer services. (Prior to 1926 the industry practice with reference to trade discounts varied; for example, dealers were allowed 5 cents per barrel at one time, while during a later period no discount was allowed. The industry has forsaken its dealer affiliations at various times, usually when business conditions were poor, at such times selling direct to customers who did not require dealer services, the manufacturer generally appropriating the discount which otherwise would accrue to the dealer.) (**) (*)

As concerns exclusive dealer distribution, complaints were made by certain large purchasers against this practice of charging them for dealers' services in cases where dealers had no part in handling the shipment. The breakdown in this system occurred, it is claimed, due to the fact that certain dealers "split" their discount with their customers, thus breaking down the manufacturers' basing point system with its uniform delivered prices. Another cause for the shift to direct selling may have been the depression, with the resultant cessation of residential building, building supply dealers having maintained their position as cement distributors through their control over residential building with its resultant bargaining power. Throughout the code period it was taken for granted that public construction through public expenditures would be the chief market for cement for several years. (*)

Lehigh Plan

The first breakdown of the established dealer distribution system occurred in November, 1930, with the adoption of the so-called "Lehigh Plan" by manufacturers representing 70 percent of the industry's annual capacity. The Lehigh Plan in effect abolished customer classification, with the exception of a 5 cent per barrel service payment to dealers for all shipments for warehouse or specific work where dealers' contracts maintained manufacturers' uniform minimum prices. (The 5 cents per barrel discount was impounded until the end of the year and made contingent upon

(*) "Price Bases Inquiry, The Basing Point Formula and Cement Prices", Federal Trade Commission (1932).

(**) "Cement Industry", Federal Trade Commission (1932).

the good behavior of the dealer.) The Lehigh Plan was abandoned early in 1931, its failure having been caused by the lack of unanimity of manufacturers in adopting the plan, with a resultant shifting of accounts by dealers to those manufacturers who still granted the 10 cents per barrel allowance, unimpounded. (*) (**)

Upon the failure of the Lehigh Plan, certain manufacturers announced that they would sell to all customers without regard to classification on the same terms as to dealers, if they were equipped to handle cement without dealer service. This group became increasingly important during the period subsequent to 1931 and resulted in the abandonment of the established dealer distribution policy in favor of a trend toward direct sales of cement to all of the larger classes of users. This lack of unanimity between manufacturers was detrimental to dealers and disturbing to the basing point price system. (*) (**)

Under NRA Code

The NRA code, approved on November 27, 1933, made uniform the practice of paying no dealer discount. The last paragraph of Article XI, Section 3, reads as follows: "No member of the Industry shall pay to any dealer any commission or other remunerations for the sale of such member's cement." On the subject of customer classification - the code contained a list of the types of large users of cement to which manufacturers would sell direct. These large users were as follows: United States Government; State Governments; Counties,. Parishes; contractors engaged in public work, except within cities, towns or villages; railroads and their contractors; owners or contractors for power development, flood control and water supply projects not requiring dealer service; concrete products manufacturers, for their own use but not for resale; and commercial concrete mixing plants, for their own operations but not for resale. The dealers were thus permitted to share only in sales to other types of purchasers, mostly small, and were compensated by a mark-up above the basing point uniform price, rather than by a discount from that price.

This move on the part of the manufacturers was quite naturally applauded by the large cement users thus benefitted and by consumer representatives interested in lower prices to consumers. The large consumers contended that no dealer service was required, and that as a rule sales and shipments were made directly between manufacturer and user, the dealer discount amounting to a tax upon them. As might be expected, dealers and dealer organizations were strongly opposed to these code provisions, claiming that they would take away most of their business, except for small unprofitable accounts, and would put them out of business. (***)

(*) "Cement Industry", Federal Trade Commission (1932).

(**) "Price Bases Inquiry, The Basing Point Formula and Cement Prices", Federal Trade Commission (1932).

(***) Transcript of Hearing, September 15, 1933.

The dealers continued their fight after code approval, and succeeded in having Article XI suspended on January 5, 1934, for a period of 60 days pending investigation and hearing. A hearing was held January 15, 1934, at which both sides maintained their former arguments. In addition, representatives of cities protested not being given the same privileges as counties and parishes. (*) On January 25, 1934, Article XI was stayed indefinitely, until such time as the Administrator should receive and approve proper modifications. While there is little direct evidence upon the subject, it is quite likely that manufacturers in actual practice followed the suspended code provisions during the period of suspension, particularly in view of the fact that the suspension was brought about at the instance of the dealers. (**)

Modified provisions were submitted and considered at a hearing held July 11, 1934. The provisions relative to customer classification were substantially similar to those which were suspended, the principal change being the deletion of ready mixed concrete manufacturers from the list of consumers who could purchase direct from the manufacturer. This group naturally strongly opposed this change in their classification, but this change was sufficient to satisfy the organized dealers, who advocated approval of the modified provisions (although certain individual dealers still opposed the provisions.) Representatives of organized contractors opposed the provisions, requesting permission to buy direct or through dealers, as they saw fit, and claiming to be large purchasers of cement. (***) The amendment to the code was not approved until May 11, 1935, at which time it contained no reference to customer classification for the purpose of direct sales from manufacturers. (The reason for the deletion of this aspect of the marketing plan is not indicated by available file material.)

Conclusion

There is no substantial evidence to indicate the effect of the code upon the method of selling in this industry. Inasmuch as the disputed Article XI was in effect for only about one month, it could have had little effect of itself. Undoubtedly the code gave both sides an opportunity to air their long standing arguments. There is evidence to show that certain manufacturers continued to follow the suspended code provisions, and there were claims by dealers of losing large parts of their business. (*) On the other hand, there is some evidence to show that dealers retained a considerable part of their former business. (****) Thus it can probably be said that the code neither

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(*) Transcript of Hearing, January 15, 1934.

(**) Policy Announcement of Lehigh Portland Cement Company (February 20, 1935).

(***) Transcript of Hearing, July 11, 1934.

(****) Letter from Code Authority, Cement Industry, to Deputy Administrator (February 7, 1935).

settled nor changed the controversy, or the tendency toward direct selling by manufacturers which had been developing in recent years.

One question comes to mind in connection with the trend toward direct selling, although its answer must remain conjectural at this time due to lack of information. With the uniform delivered prices under the multiple basing point system, and the uniform quality of cement, would not the shift toward direct selling by manufacturers to large consumers favor the larger manufacturers with their more extensive sales forces, warehouse facilities and multiple mills strategically located?

Finally, for the purpose of this report it should be noted that, regardless of other reasons, one principal reason for the shift toward direct selling by manufacturers was to maintain inviolate the uniform delivered prices established by the manufacturers' basing point system.

Note: The Cement Industry has been scrutinized by government agencies, courts, economists and industry members for many years. The Federal Trade Commission made an exhaustive survey of this industry over a period of years, its findings being reported in "Price Bases Inquiry, The Basing-Point Formula and Cement Prices" (March, 1932), and "Cement Industry" (June, 1933). Much information concerning the industry, its background, program and problems, is thus available. The Federal Trade Commission was primarily interested in finding out whether or not this industry was violating the anti-trust laws through its multiple basing point system, or otherwise. The file material at NRA, supplemented by the above Federal Trade Commission information, made it possible to develop in more detail information concerning this industry and its marketing methods and problems. Such material is available in NRA files, but it is not reported herein, inasmuch as only the above information is considered of particular interest in connection with the studies of the Distributive Relations Unit.

EXHIBIT NO. 3 (*)

WOOD CASED LEAD PENCIL MANUFACTURING INDUSTRY

PART I

General Industry Data

General Information Concerning Industry Structure and Problems.

The available files contain certain statistical information concerning the industry, although by no means a great wealth of such data. Furthermore, such information was obtained from different sources and is contradictory in certain instances. There is no means at hand of determining which information is accurate; thus certain information given below is set forth solely with the thought that it will provide a general "picture" of this industry. Unfortunately, the Bureau of the Census failed to separate the wood-cased lead pencil manufacturing industry from other writing instrument industries, so that it is not possible to obtain useful information from that source.

The following table gives information concerning the eleven firms which held membership in the Institute, this information having been contained in the original code application (**):

	1928	1929	1930	1931	1932	1933
Number of concerns in industry	11	12	12	12	12	13
Aggregate number of employees	-	2,394	2,248	2,077	1,587	1,525
Aggregate invested capital	-	-	$16,920,469	14,953,032	$13,654,365	-
Aggregate annual production in units of gross	5,850,856	5,670,517	5,575,007	4,838,087	4,095,800	-
Aggregate production capacity by units (using 50-hr. week)	-	-	8,900,000	8,750,000	8,750,000	-

(Employment figures are not absolutely accurate because the methods of pro rating between production of given commodities differ.)

The code application further stated that on August 15, 1933, the industry consisted of thirteen firms, and that the eleven firms which were members of the Institute together accounted for 97 per cent of the annual gross production in the industry in 1932. (Refer to page 430 for information concerning four other firms -- importers - which claimed to be members of the industry.)

(*) This Exhibit was written by Arthur A. Kimball.

(**) See Deputy's files - Volume A.

The letter of transmittal of the code from the Institute to the President contained certain data and contentions concerning the industry (*) as summarized below:

Sales volume of wood cased lead pencils kept in fairly steady ration to population (about six pencils per year per person) from 1913 to 1927, with the peak volume in 1927 (6,600,000 gross). Steady trend downward from 1928 to the present (1933) - 1929, approximately 5,600,000 gross; 1932, 3,514,075 gross.

This volume decline was largely due to the competitive advance in the writing instrument field of mechanical pencils, fountain pens, etc. Therefore, industry not hopeful of recovering even its 1929 volume - increase in production costs (raw materials and labor) must be compensated from some other source than sales volume.

Average price per gross reached peak in 1920, with $3.25 per gross. (From best available information - no satisfactory industry statistical records prior to 1929, when the Insitute was formed.) Since 1920, average price per gross had declined steadily - $2.47 in 1929; $1.86 in 1932.

Thus, at time of transmittal (1933), industry sales volume was approximately 50 per cent from its peak; average net price per gross was down about 43 per cent from its peak, and the return on sales was down about 60 per cent from its peak. The industry lost 7.3 per cent on $7,297,225 of sales volume in 1932 - which would total approximately $1,000,000 of loss, if a return of 3 per cent on invested capital is included.

Institute statistical records (1929-1932) showeda steady trend toward sale of lower priced pencils, and this trend is believed to have begun in 1921. During the period of volume increase (1921-1928) several new firms entered the industry, competing for sales volume on the basis of lower selling prices.

From 1928 on, as volume commenced to decline, there began a competitive contest marked by two characteristics - price cutting and imitation of appearance of higher priced numbers in cheaper goods. The yellow color had become impressed upon the public's mind as indicative of the quality or five cent pencil, thus making it a shining mark for price cutting and imitation in cheaper grades (which dealers could buy more cheaply and sell as five cent pencils.) The members of the Institute agree that only through strict standardization can quality distinctions be recovered, consumers protected, and prices raised.

(*) See Deputy's files - Volume II.

The files (*) also contain a brief submitted by the Code Authority in justification of its proposed minimum price schedule, which brief contains certain statistical information (composite report) concerning eight pencil companies. This brief is not quoted herein, inasmuch as it conflicts in part with statistical information contained in the code application, and contains no information of particular interest or importance for the purposes of this report, with the exception of the following figures, showing profit on invested capital of the eight firms: 1929 - 6.59 per cent; 1932 - 2.06 per cent loss; 1933 - 2.05 per cent.

On August 23, 1934, several months after the effective date of the Code a brief was filed by the law firm of Cooper and Cooper, Shelbyville, Tennessee, in behalf of the Musgrave and Empire Pencil Companies (**). This brief petitioned for amendment to the Code. Parts of the brief will be taken up under other subject headings, but the following paragraphs, quoted from the brief, are of general interest in connection with this part of the report:

> "Four of these thirteen companies, viz: the Eagle Pencil Company of New York City; the American Pencil Company of Hoboken, N. J.; the Joseph Dixon Crucible Company of Jersey City, N. J.; and the Eberhard Faber Company of New York, do approximately 3/4 of the total volume of business done in this industry, not counting the business done by small pencil companies, such as Blaisdell Pencil Company of Philadelphia, that are either owned outright, controlled or dominated by them. These four companies hereinafter will be referred to as the 'Big Four' because they have for years been known to the trade and to the industry as such and because they are now in control of the present Code Authority, having named every member of the same, not only in their own class but also members in Class B and C, as well.
>
> "The petitioners, the Musgrave Pencil Company and the Empire Pencil Company, are small independent producers and are in no wise subject to the influence or control of the 'Big Four', and consequently have been excluded by the 'Big Four' from representation on the Code Authority.
>
> "We are advised that in 1929 the 'Big Four' formed an instrumentality for securing certain desirable information from their smaller competitors known as the 'Lead Pencil Institute'. The present Executive Secretary of the Code Authority was employed by the 'Big Four' at a salary of $25,000 per year for his services. Was elected president of the so-called 'Lead Pencil Institute'.
>
> "The Empire Pencil Company was never at any time a member of this Institute, and the Musgrave Pencil Company, having after long persuasion, consented to membership, foud it necessary to withdraw largely because the minutes of the proceedings of the Institute seldom corresponded to the proceedings which actually took place, and especially because practically every action of the Pencil Institute, which was controlled by the 'Big Four',

(*) Deputy's Files - Folder 20.

(**) See Deputy's file - compliance folder.

was in the interest of the 'Big Four' and directly contrary to the legitimate interests of the Musgrave Pencil Company. These facts may be better appreciated when we consider that 95 per cent of the volume of petitioners' business is on pencils retailing for less than five cents each, whereas the great volume of profit, made by the 'Big Four' is upon pencils retailing at five cents each and above.

"The petitioners make no pencils retailing at more than five cents each."

In reply to the above-mentioned petition for code amendment the Code Authority filed a brief with N.R.A. (*) This brief in part contained the information and point of view summarized below:

There are three companies in the North equally as small as the four units in the Tennessee group, and if the two intermediate units are also considered, there are five smaller units not sharing the views of the petitioners. The charge that the "Big Four" have for years monopolized the industry is untrue. The Tennessee manufacturers started business in the fact of competition from older firms, both small and large, and collectively have acquired 10 per cent of the industry sales volume. (Statistical data is attached to the brief for the purpose of showing that the relative position of older companies, large and small, has not changed.) The proposed allocation of production would have maintained the share of the smaller companies. The charge that there is no competition between the "Big Four" is untrue.

On March 19, 1935, in the later days of the life of the Code, Deputy Administrator W. L. Schurz, attended a meeting of the Code Authority held in New York. Following this meeting, Deputy Schurz wrote a memo summing up the problems of the industry (**). This memo is quoted in full below (Some of the information deals directly with certain of the marketing topics which are discussed later, but the entire memo gives a picture of not only the industry but the internal and external problems with which it was vitally concerned.):

"Though the Code Authority classifies the members of the industry in three groups (a, b, and c) according to relative volume of sales, for practical purposes we may divide them into two factions, the so-called 'Big Four' and the remainder of the industry. The list of members of the industry is as follows: (Big Four) American Pencil Company, Hoboken, N. J.; Joseph Dixon Crucible Company, Jersey City, N.J.; Eagle Pencil Company, New York, N. Y.; and Eberhard

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(*) See Deputy's files - Folder 2.

(**) See Deputy's files - Folder 19.

Faber Pencil Company, 200 Fifth Avenue, New York City; (others) Musgrave Pencile Company, Shelbyville, Tennessee; Empire Pencil Company, Shelbyville; National Pencil Company, Shelbyville; General Pencil Company, Shelbyville; Richards Best Pencil Company, Irvington, N. J.; Wallace Pencil Company, Maplewood Post Office, St. Louis, Mo.; Blaisdell Pencil Company; Mohican Pencil Company, Philadephia; and Red Cedar Pencil Company, Lewisburg, Tenn.

"The principal difficulties in the operations of the Code have arisen from the refusal of several smaller manufacturers to cooperate with the 'Big Four' and the Code Authority. The leaders in the rebellion against the Code Authority are the Musgrave Company and the Empire Company, both of Shelbyville, Tennessee. The National Company, also of Shelbyville, and allied to the same group is being moved to Nashville.

"Shortly after the inception of the N.R.A. a meeting, attended by all members of the industry and lasting a week, was held at White Sulphur Springs with the object of formulating a Code. After violent and prolonged discussions a Code was finally agreed upon, which contained many extraordinary features designed to regulate competition with the industry. The proposed Code contained a provision for allocation of production, for standardizing products, a very elaborate set of marketing provisions and a provision for fixing minimum cost as a possible basis for price control on the standard lines. A liberal allocation of production brought the members, particularly Musgrave, into line with the proponents of the Code. Between the date of White Sulphur Springs meeting and the date of hearing on the Code, the news leaked out to the trade that the Code probably would result in raising prices, so that there was a flood of orders. Musgrave and his allies profited heavily by this business, and as a consequence withdrew their support of the Code, in the belief that their new customers would assure their future regardless of the Code. All cooperation between the two groups in the industry ceased from that point and their relations have since increased in bitterness, until now the comprehensive trade practice provisions of the Code are virtually inoperative. The fight was carried into the Public Hearing on the Code, which eliminated the important provisions on production allocation.

"The price war which had begun before N.R.A. was intensified to the point where finally none of the larger producers could make a profit, and the smaller members were apparently working on a close margin, though increasing their volume. The Code Committee contends that in this price war the Musgrave--Empire Group has taken the initiative at all times in cutting prices.

"The recalcitrant group claims that due to their low overhead and production costs in general, they are able to show a profit at much lower figures than are needed by their competitors. Efforts of the Code Authority to have the N.R.A. approve a minimum scale of cost, having failed, the Code Authority asked to have all price provisions of the Code stayed, as was later done.

Meantime Musgrave and other of the Tennessee group appeared before the Darrow Board to complain of oppression and discrimination by the larger elements in the industry. The prejudiced manner in which this hearing was conducted further antagonized the Code Authority and widened the breach in the industry.

"The most important factor in the Pencil Trade is the Chain Store business, particularly that of Woolworth, though other chains are large volume buyers. These orders practically decide the cost of prices in the whole industry, because the Woolworth buyers are in a position to drive a hard bargain for their pencil requirements. At the present time the Eberhard Faber Company, one of the 'Big Four', has about 60 per cent of its output tied up with its Woolworth account, while the Empire Company is manufacturing almost exclusively for Woolworth. It is the practice of Woolworth to take a pencil made to sell at three for a nickel and sell them for four for a nickel. This has the result of upsetting the price structure in the Retail Stationery and Novelty Trade, who put pressure up through their wholesalers on the manufacturer for similar consideration. The effects of these prices reach up into the five cent pencil class, which the Chain Stores tend to sell at two for five.

"The proposal of the Code Authority to adopt standard specifications, requiring that yellow pencils should not retail under a nickel, was disapproved by the Consumers' Advisory Board, thus depriving the industry of another possible check on falling prices. At present at least one of the Tennessee group is making a yellow pencil to sell at two for a nickel.

"This industry should have open price filing and Col. Gaskill has endeavored to have them adopt such a provision in their Code. However, to be effective, this would require filing of all special discounts which members of the industry are accustomed to give to their preferential customers. Though these special terms are apparently known to everybody in the industry, there is a disinclination to file these discounts. Also, the smaller manufacturers have offered similar terms to the smaller customers of the 'Big Four', many of whom have been taken away from the larger members of the industry by this means.

"Added to the internal difficulties of this industry, are Japanese competition and the competition of fountain pens and mechanical pencils. In this connection it is interesting to note that the production in the industry has been stationary for many years.

"To summarize:

1. The present N.R.A. policy is entirely inadequate to place effective restrains in price cutting in this industry;

2. Price filing would mitigate the worse features of the present situation;

3. There is no evidence that the larger members of the industry have oppressed the smaller members under the Code;

4. On the other hand, it appears that the present demoralized status of the industry is largely the work of the so-called 'little fellows' who have very considerably increased their share of the total business of the industry."

On August 14, 1934, the Code Authority sent a memorandum to the Deputy Administrator containing certain general information and a point of view concerning the industry and its problems, as summarized below (*):

The "Big Four" (**) have been in business more than 50 years and do over 15 per cent of the business each. Their percentage of the total business has been declining in the last few years - 80 per cent in 1927, 76 per cent in 1930, 72 per cent in 1932, and 66 per cent in 1933 (***).

The Class B companies (****) doing 5 to 15 per cent of the business each have been in business more than twenty years and have increased their business considerably in the past seven years (*****).

The Class C companies (those doing less than 5 per cent each) are divided into three groups:

1. The Eastern companies (Richard Best, Blaisdell and Mohican) which have supported the Code. Old companies -- only Mohican has increased its percentage of total business.

2. The Tennessee companies who assented to Code (Red Cedar and National). Red Cedar has been in business about three years, but its operations have been of consequence only during the past three years. National is a new company, and is claimed to be an uncontrolled violator of the Code (particularly Article X, Sections 6 and 19, and Article VII, Sections 8, 9, 10 and 16.)

(*) See Deputy's files - Folder 24.

(**) American, Dixon, Eagle and Eberhard Faber Pencil Companies.

(***) From best available information - as Musgrave and Empire are not reporting statistics as required by code.

(****) Wallace and General.

(*****) Wallace is stated to be more than twice the size than General, and it is claimed that General has been doing some fancy chiseling, although difficult to get evidence.

3. The recalcitrant members (Musgrave and Empire) who have opposed the Code from its inception and have tried to wreck it. These companies have most specifically violated Article VI, Section 6 (c) (reports), Article VII, Sections 8, 9 and 14 (secret rebates), and Article X, Sections 3, 5, 6, 7 and 19 (price filing, terms, seconds).

The memorandum further states that Musgrave and Empire have interlocking directorates for certain purposes, as shown by the following direct quotation:

"1. The Empire Pencil Company has been set up as a 'straw man' by the F. W. Woolworth Company in order to beat down the price of other manufacturers. The largest purveyor of pencils to the Woolworth Company before the advent of the Empire Company was the Eberhard Faber Pencil Company. By use of what amounts to really an unfair practice, the Woolworth Company has increased the business of Empire at the expense of Eberhard Faber and the rest of the industry. Empire sells no other chain store, and the whole situation reeks of an attempt to evade the N.R.A. A long term contract which violates a great many provisions of the Code, of which both parties had knowledge before the Code was signed, was entered into by them with the obvious intention of evading the Code provisions.

"Although the Code provides in Article 10 that consumer prices must continue at 1 cent each, 2 for 5 cents, etc., the Woolworth Company is attempting to enjoy a monopoly of the pencil business by being able to buy goods cheaper under their contracts than it would be possible for them to do, if the minimum price schedule contemplated from the beginning of the Code, included in the Code, and adopted by the Code Authority in March, but still not approved by the Administration were operative. This price schedule was supposed to represent a fair minimum price for the entire industry. Note particularly that the Empire Pencil Company had no selling expense, as their orders are received by mail from the Woolworth Company and hence they are in unfair competition with other members."

The memorandum then contains other statements which might be summarized as follows:

The Code will end in failure unless (1) Some punitive action is taken against Musgrave and Empire and (2) The minimum price schedule is approved as it stands, or (3) The industry's method of adopting it is approved instead of the method proposed by N.R.A., of basing selling prices on cost, even if certain prices have to be changed.

The extraordinary growth of Musgrave and Empire to a point where they each do a little over 4 per cent of the business, would when totaled place them in Group B, with different marketing terms from Group C.

The Importer Group

In addition to the thirteen companies accepted by the Lead Pencil Institute as members of the industry, four other firms strenuously sought admission under the Code as industry members. These four firms were respectively: The Koh-I-Noor Pencil Company, Inc., A. W. Faber, Inc., Swan Pencil Company, and J. S. Staedtler, Inc. These firms will be referred to herein as the "importers" inasmuch as they were generally spoken of by that term in the various conferences and correspondence which concerned them.

The members of the "importer group" imported leads and certain other material and purchased other necessary material from the domestic markets. They then turned this material over to a manufacturer, who, by contract, fabricated it into the finished wood cased lead pencil. The finished pencil bore the name and brand number of the importer concerned. From statements below it will be seen that the importers were insistent that they be classed as industry members if the Code were given any jurisdiction over them, but otherwise they did not insist upon such classification. The Code proponents on the hand were insistent that this group of importers not be included as members of the industry, for reasons shown below, and were successful in having them excluded. However, as was feared by the importers, the Code Authority later attempted to impose certain regulations upon the importers, in spite of the fact that they had no voice on the Code Authority. However, this attempted regulation was not successful.

At the public hearing on November 6, 1933 (*) Mr. Hall, who represented the protesting group, consisting of the four importers and the Musgrave, Empire and National Pencil Companies, stated, among other things, that the Code for this industry should include importers, who, by contract, have pencils assembled for them in this country, and such members should have a voice on the Code Authority. The Handkerchief Industry Code was cited as an example in support of Mr. Hall's proposal. Mr. Hall stated that firms like the importers have uniformly been recognized as members of the industry by the National Stationers' Association and Wholesale Stationers' Association, and by members of the Lead Pencil Institute, Inc. Mr. Hall further stated that an amendment proposed earlier in the hearing by the Code proponents, reading as follows:

> "All of the provisions of this Code applicable to importers shall apply to their sales agents as well",

is for the obvious purpose of governing these importers without giving them a voice in the administration of the Code. (**)

(*) See transcript of hearing, pages 87-111.

(**) See "Customer Classification", Part II, page A-87, for discussion of later attempt to govern importers by classifying them as "sales agents."

In reply to a question from Deputy Paddock as to proper definition of a manufacturer, Mr. Hall stated that it was an individual or concern which makes or has made on his behalf a certain finished product. Deputy Paddock pointed out that in Docket 1905, the Federal Trade Commission restrained a firm from representing itself as a manufacturer unless and until such respondent actually owned, controlled or operated a factory in which pencils were manufactured. (Note: At this point in the hearing there was a longer discussion as to the proper definition of the term "manufacturer"). Of principal interest is the statement by Col. Gaskill of the Lead Pencil Institute as to his idea of what constitutes a "manufacturer":

> "Our definition of manufacturing commences with planing the "flats", groving them, inserting lead into the grooves in glue, fitting the flats together to produce a block of wood with the lead in the center, cutting by the shaping machine (which produces either a round or a hexagonical pencil) and concludes with the production of the pencil, which then receives further treatment, either by painting or varnishing, with or without the additional of a metal tip and eraser, and with or without a stamp or imprint which gives it the brand and name of the manufacturer or of a dealer. The manufacture of the finished leads and pencil slate are an antecedent stage of industry, which may or may not be included as part of 'manufacturing' pencils, as above described. Manufacturers of leads, flats, and paper pencils are not under this lead pencil industry, although there is a possibility of these being taken in under this Code later." (*)

Col. Gaskill then entered a brief in opposition to demands of the importers, This brief states that the only relation of these importers to the public is as dealer or distributor, and that the manufacturers with whom they contract alone are properly to be admitted to membership under the Code.

> "The importers are simply distributors of special and exclusive brands which are made for them in this country to avoid the tariff duty on finished products."

The brief then cites several cases on the subject before the Federal Trade Commission and the Courts. Two of these cases were concerned with the Lead Pencil Industry. The General Pencil Company also sells pencils to the U. S. Pencil Company, a New York dealer, under the brand "Evergreen", which is marketed exclusively for that dealer. The Federal Trade Commission in 1932 issued a cease and desist order against the U. S. Pencil Company to prevent it from representing itself as a manufacturer unless and until it actually owned and operated a factory. (**) A similar case (***) concerned the Reliance Pencil Company, which obtained its

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(*) See transcript of hearing, pages 132-143.)

(**) Docket 1905

(**) Docket 1924

pencils from the Red Cedar Pencil Company. The brief further states that the Institute does not object to inclusion of all domestic manufacturers, but does object to inclusion of dealers with manufacturers, particularly if these importers represent foreign competitors to whom the domestic manufacturers do not wish to disclose details of their export trade.

In a letter dated December 4, 1933, Irving P. Favor, President of the Koh-I-Noor Pencil Company, New York City, to Mr. T. R. Taylor, Industrial Adviser, objection is made to Mr. Taylor's opinion that the importers are not manufacturers and therefore should not be governed by the proposed Code. Mr. Favor claims that if this Code is cover the "industry", his firm is part of it. If it is to cover only certain special manufacturing processes, part of the industry, that is another matter. In the latter case, Mr. Favor states that no Code provision should govern a greater extent within the industry than that part defined. If he is to be governed at all, Mr. Favor wants a voice on the Code Authority and to be considered a part of the "industry" as defined. (*)

A letter dated November 16, 1933, from the President of J. S. Staedtler, Inc., to the Consumers' Advisory Board, contained the following statement:

> "Since the organization of this Corporation in 1922 it has been its custom to exchange from time to time, as issued, price lists with all the members of the Lead Pencil Institute, thus confirming the fact that goods sold by the Corporation are considered a complete competitive line by the industry. This accepted fact is furthur shown in that our prices for similar products were always on a competitive basis with other manufacturer's prices. Such products upon such price lists have always been sold in competition by this Corporation with other manufacturers in fair rivalry to the same purchasers, whether wholesalers or retailers. It is evident that only a manufacturer in the true sense of the word selling at fair and reasonable competitive prices such as we have always done, could and can remain permanently in business, justified also by his service to the public from the wholesaler down to the consumer, and employment of American labor." (**)

The files contained an unsigned letter dated March 16, 1934, but from other correspondence in the files, this letter would appear to be from Mr. J. P. Fitzpatrick of the Red Cedar Pencil Company, Lewisburg, Tennessee. (***) This letter states, among other things that the importers object to being classified as "sales agents" of manufacturers,

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(*) See Deputy's files - Volume B-2, pages 125-128.

(**) See Consumer Advisory Board files - Folder C.

(***) See General files - Folder 333.

and suggests that it probably would be better to allow them a vote in the selection of the Code Authority, and while giving them separate designation, to bring them under the Code subject to the general rules and regulations as manufacturers.

Importation Problems.

Strong complaint against the increasing volume of Japanese imports of lead pencils was made by the industry. The industry petitioned for protection in addition to existing duties, under the terms of Title I, Section 3(e) of the National Industrial Recovery Act.

The files contain the following documents pertaining to this subject: (*)

1. An Executive Order directed to the Tariff Commission, directing it to investigate the facts in the complaint under Title I, Section 3(e) of the N.I.R.A. against Japanese imports of lead pencils.

2. A letter from the Administrator to the President on the same subject, recommending that the President issue the above-mentioned Executive Order and containing information in support of the complaint.

3. "Survey of Information on Wood-Cased Lead Pencils", containing considerable statistical and other information on the subject of the complaint.

4. A letter, dated October 25, 1933, from John K. Reckford of the Pencil Makers' Association, calling for relief from Japanese imports under Title I, Section 3(e) of the Act, and giving statistics showing the volume from 1929 to date (number, value and average value per gross). (**)

Available files do not show the outcome of this petition. However, Mr. Durke of the NRA Imports Division stated to investigator by telephone on November 18, 1935, that the Japanese Ambassador and the State Department made an informal agreement whereby Japanese imports into the United States would be limited to 125,000 gross per

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(*) See Deputy's files - Volume A, page 253, and Volume B - 2, pages 159-172.

(**) These statistics in these documents purport to show that while Japan is new in this manufacturing field, its production and importation of pencils is increasing rapidly; that it is importing pencils to sell at a price much lower than domestic industry can meet, even after paying existing duties. Japanese pencils, furthermore, are claimed to be far inferior in quality to domestic pencils.

year, not more than 45,000 gross in any three months, nor more than 25,000 gross in any one month, this agreement becoming effective May 1,1934; that under date of October 3, 1934, Nelson B. Gaskill, Secretary of the Code Authority, contended that the Japanese had exceeded by 14,000 gross the maximum quantity called for in the agreement for any three months' period. Mr. Burke said further that the Imports Division then notified Mr. Gaskill that his figures were in error and that the Japanese imports had not exceeded their allotment, and there was no further discussion or complaint in the matter.

A chart with the name Eberhard Faber at the top, sets forth the following information: (*)

Lead Pencil Industry

	1929	1930	1931	1932	1933
Total U.S.Sales (including export)	$5,650,000	$5,550,000	$4,850,000	$4,100,000	$4,100,000
Export sales only	565,000	496,000	330,000	180,000	171,000
Value imports	186,000	146,000	93,000	68,000	246,000
(Japanese)					(165,000)
(German)					(79,000)
Percentage of industry Sales volume by "Big Four"			65.9	66.0	65.9

The files contain only two other statements which it is believed will be of interest as a part of the industry "background" information recorded in this part of the report;

The manufacturers being located in two more or less distinct groups (one on the East Coast; the other in the South or Middle West), and one of the firms (Empire Pencil Co.) having moved from New York City to Shelbyville, Tennessee, the following information given by Mr. Wallace of the Wallace Pencil Company, Maplewood, Missouri, at the public hearing, may be of interest:

> Mr. Wallace discussed his cost of getting his goods to the market in relation to that of the Eastern manufacturers, stating that he had the same problem as the Tennessee manufacturers in delivering goods to New York City, an expensive proposition, but that he had an advantage in serving the West and Mid-West. He stated that his location also saved money in obtaining raw materials, as is transferring leads and rubber by truck from Atlanta, Georgia, to St. Louis, Missouri, at a considerable saving on railroad rates to the East. He said he felt his location was no handicap or expense.(**)

(*) See Deputy's files - Folder 24.

(**) See Transcript of hearing, pages 161-163.

List of Manufacturers by Volume Class.

The thirteen firms comprising this industry are listed below according to volume class; (*)

Class A Manufacturers:

1. American Pencil Company, Hoboken, N. J.
2. Joseph Dixon Crucible Co., New York, N. Y.
3. Eagle Pencil Co., New York, N. Y.
4. Eberhard Faber Pencil Co., Brooklyn, N. Y.

Class B Manufacturers:

1. General Pencil Co., Jersey City, N. J.
2. Wallace Pencil Co., Maplewood, Missouri.

Class C Manufacturers:

1. Richard Best Pencil Co., Irving, N. J.
2. Blaisdell Pencil Co., Philadelphia, Pa.
3. Mohican Pencil Co., Philadelphia, Pa.
4. Red Cedar Pencil Co., Lewisburg, Tenn.
5. Musgrave Pencil Co., Shelbyville, Tenn.
6. Empire Pencil Co., Shelbyville, Tenn.
7. National Pencil Co., Shelbyville, Tenn.

Also at the public hearing, Mr. Berolzheimer of the Eagle Pencil Company stated that firms in the South are new in the industry - one less than a year, the others only three or four years - while the northern manufacturers are all old firms (his firm having been in business for seventy-eight years.) Thus, he stated the equipment of the southern manufacturers must be newer and more modern than that of the northern group. (**)

(*) See Deputy's files - Volume A, page 177.

(**) See transcript of hearing, pages 197 and 198.

PART II

Trade Practice and Marketing Rules

A. General Distribution

In this section of the report will be information concerning certain subjects of interest in this study, but which do not fall within the scope of the specific study topics, such as allocation of production and standardization, as well as data relating to the general marketing program, rather than being principally concerned with certain specific topics. Much of the general information contained at this point of the report will be of interest when studying the various special topics, while information contained in sections on various special topics is necessary in obtaining a proper and complete "picture" of the general situation - thus, all of the information presented in this Part II, whether general or specific, should be considered in determining the marketing program of this industry, its purposes and effects.

Chart A contained in Part II of the Report (page 319) lists the various trade practice and marketing provisions contained in the Code for the Wood-Cased Lead Pencil Manufacturing Industry, shows the status of each provision during the time the Code was effective, and describes each provision. In addition, is included a list of trade practice and marketing provisions proposed in the original Code considered at the public hearing, but deleted before approval of the Code.

(Information contained in this report shows that a number of provisions were suspended by the Administrative Order approving the Code; that an effort was made by the Code Authority to have these provisions reinstated; that this effort failing, other provisions were suspended later at the request of the Code Authority. Thus many of the provisions which are the subject of considerable discussion in this report were never effective, so no information concerning their actual operation is available; however, the arguments pro and con concerning them, made at the time they were proposed, are somewhat informative.)

The letter of transmittal of the Code to the President, containing a detailed statement of the objectives and reasons for the proposed trade practice and marketing rules, is quoted under the heading "Resale Price Maintenance" and should be referred to at this point by the reader.

(Note: While the statements of the Code proponents quoted in this report refer generally to the marketing rules of the Code as proposed by the Institute, and deal specifically with certain specific subjects, the writer noticed no attempt by the sponsors to justify individual provisions until they were attacked by some opponent, nor did the Deputy who conducted the public hearing call for such justification.)

The following information is contained in an unsigned brief (evidently prepared by the Lead Pencil Institute.) (*)

For many decades, consumer prices on popularly used types of pencils have been 10 cents each, 5 cents each, 2 for 5 cents and 1 cent each. Whether the cheap rubber insert pencils have been sold to the trade at $1 per gross, or under distress conditions at 72¢ per gross, the retail price to the public has remained 1 cent each. Whether 5 cent pencils have been sold to the trade at $4 per gross, or under distress conditions at $3 per gross, the retail price has remained 5 cents each.

Thus, it is apparent that retail prices of pencils are automatically fixed by units of currency. For example, there has never been a successful sale of a pencil retailing at 4 cents each. On the other hand - and important to the public interest - there have been retailed at 5 cents each, many imitations of 5 cent pencil purchased by the dealer at about half the price of recognized good quality 5 cent pencils.

Therefore, marketing policies designed to maintain order and fair trade do not work a hardship upon the general public, but rather protect it from deception in the value of unknown brands of pencils. In building their natural lines, manufacturers are forced to reckon with natural retail prices at which pencils will popularly sell, particularly because of the competition from mechancial pencils, etc.

Thus it is clear that manufacturers' selling prices merely fix the division between manufacturers and dealers of available margin between manufacturing costs and retail prices. The dealer and his employees are entitled to reasonable compensation for a service which the manufacturer is not able to perform.

The brief then points out that the two methods which should be taken to protect the public are the established selling prices and the establishment of standard specifications. (Several paragraphs are devoted to suggested standards, it being pointed out that differences in grade of pencil should be made clear to the public through some obvious method, such as color, etc.)

It is pointed out that existing conditions have not produced a net gain for the consumer, but have worked a hardship on labor (this latter conclusion based on figures showing sales, wages, labor cost per gross, etc., for good and depression years.)

At the public hearing on November 6, 1933, Colonel Gaskill of the Lead Pencil Institute added the following information to the remarks made by Mr. Elmer (Mr. Elmer's remarks were merely a repetition of the information in the letter of transmittal, so are not included in this report):

(*) See Deputy's files - Volume L-1, page 82, et seq.

In the old days the process was to establish a trade discount to the wholesaler which carried a little differential to the retailer and so to the consumer. The modern developments of distribution, pointed out by Mr. Elmer, made this system impossible.

Since the manufacturer must sell to the consumer and be in competition with the distributor, the manufacturer's list price is based upon his price to the consumer and the discounts to distributors, etc., are deducted from that list price to enable them to compete with the manufacturer. The manufacturer can set his own list price (except as limited by restricted minimum filed prices) but the discounts from list provide the dealer a reasonable margin, whatever the list price. (*)

On August 14, 1934, the Code Authority summarized the situation in the industry in a memorandum which will be found quoted in Part I, "General Industry Data."

On March 20, 1935, Deputy W. L. Schurz wrote a memorandum in which he summarized the problems of the industry, its marketing program and the difficulties encountered under the Code. This memo is quoted in full in Part I, "General Industry Data", and should be referred to by the reader at this point.

A memo dated August 29, 1934, from Assistant Deputy Searle to Division Administrator Murray, reporting on Searle's attendance at a Code Authority meeting, shows that discrimination against small manufacturers had been alleged, but that he (Searle) thought such charges were untrue. (**) The following is quoted from this memorandum:

> "At my request the reasons for several protested provisions of the Code were discussed. I am satisfied that many of these provisions as now in the Code do in themselves constitute a considerable amount of care and discretion on the part of the Code Authority and 'Big Four', so that the small manufacturers may not be oppressed.
>
> "I am satisfied that the complaints against two protestants in Tennessee are justifiable and are the result of their intention to resort to technical subterfuge to defeat the intent of the Code.
>
> "Net volume of sales in this industry has been declining for several years. In the face of this fact, I find that the volume of business done by the two protestants in Tennessee has materially increased over the past four years, and it should be noted that they have only been in business five or six years."

(*) See transcript of hearing, pages 230-235.

(**) See Deputy's files - folder 18.

At the time that the Code Authority requested the suspension of additional Code provisions, as referred to above, Colonel Gaskill of the Code Authority, made the following statement in a brief which he filed:

> "Article ___ as it was contained in the Code draft submitted to the National Recovery Administration was a complete, interlocking, marketing plan, all the details of which were necessary to the completion of the plan and each of which practically without exception, was dependent upon the approval of the Article as a whole."

The brief goes on to state that without the entire marketing plan as originally submitted the provisions which it is now believed should be stayed are unworkable and present an opportunity to certain pencil manufacturers to chisel at will. It is therefore, requested that all provisions relating to price lists and minimum prices should be suspended until such time as the entire marketing plan is put into effect. (*)

Certain groups and individuals sent briefs and letters in support of the Code proposed by the Lead Pencil Institute.

The Wholesale Stationers' Association of the U.S.A. (consisting of about one hundred leading wholesale distributors of lead pencils) filed a brief in favor of the Code, with the exception of Schedule B, Section 12. With the above exception, the wholesalers strongly endorsed the proposed Code, stating that lead pencils are to the stationery industry what sugar is to the grocery industry - are standardized as to design and quality, are trade-marked and highly advertised, and therefore lend themselves to predatory price cutting and other forms of cut-throat competition which makes their distribution unprofitable. (**)

The National School Supply and Equipment Association presented a resolution backed by its Eastern members (representing 90 per cent of the distributors) to the effect that they approved the Code in substance, with particular respect to those provisions of a properly protected resale price schedule, together with careful planning of marketing channels so as to protect the distributor. (***)

Horder's Inc., Chicago, Illinois, filed a brief in favor of Schedule B, stating that with twenty-five years of experience in wholesaling and retailing as a background, he finds that Schedule B will affect various interests as follows: (****)

(*) See Deputy's file - folder II.

(**) See Deputy's file - Volume B-1, page 79.

(***) See Deputy's file - Volume B-1.

(****) See Deputy's files - Volume B-1, page 77.

"1. Consumer: (a) At present prices on a single type of pencil range from $3.75 per gross (too little) to $6.75 (too much). Prices to large corporations are frequently so low that small purchasers pay too much, so that the manufacturer averages out a profit. The intent of the Code is to treat all purchaser fairly. (b) Where competition forces standard advertised brands too low in price, inferior grades (with appearance similar to better grades) are substituted to the detriment of the public. Advertising and custom have placed the price of a good pencil at 5 cents, which automatically limits the price of this type of pencil. (c) Wood cased pencils do not monopolize the market due to competition of mechanical pencils at low prices.

"2. Retailer: Retailers know the automatic resistance point of each item, and price accordingly. To remain in business, retailers must make a profit. Where chiseling is permitted through unrestrained competition, profit vanishes or is reduced to a point where both service and wages are curtailed. Services of retailer are indispensable both to the manufacturers and the public. The purpose of Schedule B is to set a price which is fair to the public, at the same time guaranteeing the retailer a fair margin of profit and protection from chiseling. The discounts stated are in accord with industry operating costs as determined by broad research. The profit factor will be found to be in accord with Department of Commerce statistics on retailing.

"3. Jobber: Last two decades have improved transportation facilities to an extent which somewhat minimizes the importance of the jobber function - yet there is absolute need for the wholesaler. It is necessary to design the Code in such manner as to fit the jobber into place - this has been done."

The files contain letters from 26 firms (wholesalers, retailers - stationery and office supplies) favoring the Code. These letters frequently state the volume, etc., of the writer. One firm, McClain and Hedman, St. Paul, Minnesota, states that the Code should make pencils a profitable item for the dealer; that at present, pencils are used as loss leaders by mail order houses, and sold by jobbers direct to consumers at prices which dealer cannot meet. There is also a letter of approval from the Stationers' Association of New York. (*)

Other letters in favor of the Code, or sections thereof, are recorded under specific special topics, elsewhere in Part II.

There was also considerable criticism of the Code from various sources, much of which is recorded in other sections of this report.

(*) See Deputy's files - Volume B-1, pages 169-191, and Volume B-2, page 68, et seq.

A brief filed by several small manufacturers and importers, discussed in more detail elsewhere, stated that the Code was presented by the Institute without giving them an opportunity to participate, and that it does not represent the view of the whole industry, but only of a group composed principally of the four major companies, and that it operates specifically to give some few a monopoly.

On August 15, 1933, the Mail Order Association of America filed a brief objecting to price fixing provisions in N.R.A. Codes, and stating: (*)

> "Mail order firms reach about half of the families in the U.S., these customers for the most part being farmers and wage earners in the lower income brackets. These customers do without certain service, such as credit and delivery, and undergo the necessary delay, in order to obtain the savings thus afforded by this less expensive method of distribution. Thus a 'balance' has been maintained between this and the dealer type of distribution. Any price fixing scheme forcing mail order houses to charge for expenses not incurred, including cost of the most inefficiently managed types of dealer distribution would throw out this 'balance', and prevent this saving to the type of customer who needs it, and who is willing to give up service and convenience to obtain it. The mail order houses use private brands, and on a price differential compete with highly advertised brands. Price fixing would force business out of one channel into another, and would promote monopoly as to method of distribution.

Specific objections of this Association's will be found in other sections of this report.

The National Retail Dry Goods Association (representing 4,000 department, dry goods and specialty stores) filed a brief containing many objections to this Code. (**) These protests are treated individually under the specific topic concerned. At the hearing, Mr. Irving C. Fox, representing this association, objected generally to these manufacturers trying to follow their product into another industry and dictating the way it is handled there. He stated that if the manufacturers choose to be retailers, they can follow the Retail Code. (***)

At the public hearing, Mr. Hall, representing several small manufacturers, stated that: (****)

(*) See Deputy's files - Volume B-2, pages 18-21.

(**) See Deputy's files - Volume B-1, pages 26, et seq.

(***) See transcript of hearing, pages 269 and 270.

(****) See transcript of hearing, pages 238-249.

"This schedule does not deal with marketing alone, but affects the business as a whole - the Lead Pencil Institute is trying to dominate everything up to and including the consumer. The proposed provision places the determination of vital matters in the hands of the Code Authority, and the institute is set up as the Code Authority. If the concerns represented by Mr. Hall are excluded from the Code and from representation, as the Institute is attempting to do, they will be controlled by their competitors, without voice."

On September 15, 1933, Mr. H. C. Woosley, President of the National Pencil Company (which had entered the industry only a few months before) wrote a letter objecting to the Code proposed by the Institute, in which letter it is claimed the Institute would like to eliminate this company and quotes statements to that effect made by the Institute. Therefore, objects to any Code provisions (1) requiring reporting of confidential information to committee of Institute; (2) permitting the Institute members to allocate production among manufacturers; (3) fixing terms, providing resale price maintenance, and fixing minimum prices (for this newcomer's only method of competition with older, well-advertised brands, is through price competition); (4) placing administration in hands of Institute for above reason; (5) dictating kind, size, type, finish and other detail of manufacture of pencils (claims would stifle any incentive to improve quality, etc. - and is unnecessary and improper regulation of industry.) The letter further claims that this small industry has no need for this voluminous Code which gives the Institute an even greater monopoly, and suggests a simply Code (set forth therein) consisting solely of labor provisions and a statement of free and open competition. (*)

The reader is also referred to the brief filed in behalf of two small manufacturers (Musgrave and Empire Pencil Companies) requesting amendments to the Code. This brief and the reply of the Code Authority thereto, are quoted in various sections of this report under the specific topics concerned. (**)

The Limited Price Variety Stores Association (5 cent and 10 cent, etc. stores) wrote seconding and objections made by the National Retail Dry Goods Association. Objection is made specifically to Article V, "Marketing Terms": Art. VII, Sections 5, 6 and 7; Article VIII, Sections 1, 9, 18, 19, 20, 21, 22 and 23; Schedule B (most of its provisions) extreme examples being, Sections 9, 10, 11, 12, 13, 14, 15, 16 and 18; also provisions concerning allocation of production and standardization. (***)

(*) See Deputy's files - Volume A, pages 181-183.

(**) See Deputy's files - Compliance folder.

(***) See Deputy's files - Volume B-2, pages 179-183

(Most of the argument provides no new information, so is not abstracted.) The Association is opposed to all provisions savoring of price fixing, and to provisions amounting to boycott, or tending to regulate retailers and others not part of the manufacturing industry. It is felt that retailers should have a say in provisions affecting them. (This includes such provisions as standardization and simplification.) Feels that this Code is an effort at monopoly, intended to increase manufacturers' profits even though sales continue to decline.

The following is quoted from the report of the Resident Industrial Adviser (Brennan) to his Board prior to the approval of the Code: (*)

> "The Wood-Cased Lead Pencil Code has been in process well over four months, and has been troublesome from the start. The industry---rather the four members who themselves produce 75 per cent volume of the business--have endeavored to dominate the Code beyond ordinary reason, as first against the minority and next in insisting upon advantages and rights under the Code patently against reason and the common weal.
>
> "The proponents of the Code have had quite the advantage in obtaining provisions and clauses in the Code that are quite to their own liking and perhaps with some advantage over the smaller members."

In a letter dated April 19, 1934, Frank A. West (a jobber) stated: (**)

> "***with both the large and small pencil manufacturers selling to jobbers and stationers at the same prices and same terms, I can see immediately that the small manufacturers must not have had much to do with the drawing up of this Code, because at the equal prices, the larger (Big Four) nationally advertised pencil concerns will soon have 100 per cent of the business.
>
> "If allocations of production is provided for, the larger fellows will be successful in keeping the small fellow from becoming any larger. Keep the little fellow little. However, at equal prices, the little fellow will not only be kept little, but eliminated entirely. I am positive that the little fellows have prevented the larger fellows from just about running wild on prices of pencils to the public***."

(*) See Industrial Advisory Board's files - Volume I, August 1933.

(**) See Deputy's files - Trade Practice folder.

Certain small manufacturers and importers on October 21, 1933, submitted a Code for the industry. (*) These firms were: Empire Pencil Co., Red Cedar Pencil Co., General Pencil Co., A. W. Faber, Inc., Koh-I-Noor Pencil Co., J. S. Staedtler, Inc., and Swan Pencil Co., Inc. The last four named comprised the so-called "importer" group, which was excluded from the Code as industry members.) Certain of the provisions of the Institute's Code which this proposed Code omitted are mentioned specifically elsewhere herein. In addition, the following principal changes are noted:

Definitions: Industry to include importers representing foreign manufacturers who import materials and contract for their manufacture here into pencils with American labor. Also defines "dealer" as wholesalers and retailers of lead pencils (except those for use as advertising) and does not define "distributor".

Marketing Terms: (**) This proposed Code included only Sections 1, 3, 5, 6, 7, 8 (plus a clause providing a ten-day suspension of any price list for investigation upon objection to the effect that it was improper), 9, 17, and 19 out of the 25 Sections proposed by the Institute under Schedule B (later contained in the approved Code as Article X.)

Unfair Trade Practices: (***) The proposed Code included only Sections 1, 2, 3, 4, 5, 6, 7, 8, 9 (partially - deleting clause prohibiting sales to purchasers who resell below fixed minima or agreed resale prices), 10, 11, 12, 13, 14, 15, 16, 17, 21, 23, 24, 25, 26, and 27 of the 29 sections contained in Article VIII of the Code proposed by the Institute.

Administration: This proposed Code provided for a Code Authority composed of one representative from each member of the industry. This Article also provided for the attempted establishment of a uniform cost accounting system for the industry, and prohibited sales below the average cost of production as determined by said cost accounting system (these provisions were similar to Article VII, Sections 5 and 6 of the Code proposed by the Institute, except that the Institute Code prohibited sales below the individual cost of production, and also exempted obsolete, damaged and imperfect goods.)

(*) See Deputy's files - Volume A, page 221, et seq.

(**) The provisions mentioned are substantially similar in substance, except where difference is expressly noted. Differences in form and minor differences in substance are not pointed out.

(***) The provisions mentioned are substantially similar in substance, except where difference is expressly noted. Differences in form and minor differences in substance are not pointed out.

Allocation of production was contained in Article X of the Code proposed by the Institute, but was deleted prior to approval of the Code. This Article was composed of six sections and in detail provided for allocation and equalization of orders to the allotted volume of production. Orders in excess of the allotted amount were to be obtained by the manufacturer concerned from a manufacturer who had not reached his quota, etc.

At the public hearing on November 6, 1933, Mr. Wallace of the Wallace Pencil Co. spoke in behalf of the Code proponenets. (*) After pointing out conditions in the industry - a permanent loss of volume due to competition of mechanical pencils, etc., the addition of new units, the constantly declining price average per gross, the great excess in productive capacity, etc. - he stated that the alternative programs were a sales contest to the finish and allocation of production on an equitable basis. He further stated that the basis of allocation proposed (at a meeting of all manufacturers except two small ones - National and Empire) was the shipments of each manufacturer during 1930, 1931 and 1932; that this was fair to the small manufacturers as they had a considerable increase in business during those years through underselling and using a cheap imitation 5 cent pencil.

Mr. Wallace stated further that if any factory failed to get orders up to its full quota, a manufacturer getting orders in excess of its quota would get its pencils from the former manufacturer; that thus each plant and its employees would be assured a certain volume.

In concluding he stated that consumers would be protected by their habit of buying in terms of fractional currency - and that when the industry was relieved of the struggle for volume, competition would be on the basis of quality, etc., to the advantage of the consumer.

Mr. Hall then spoke on behalf of certain small manufacturers who opposed the provision and gave an opinion which might be summarized as follows:

> The theory of allocation is contrary to law and economically unsound. It gives concerns which had a big business several years ago a perpetual right to do that volume of business. If we obtain public acceptance of our products by efficiency, we should not be held down.
>
> Furthermore, as to the basis of allocation - since 1930, three of the "Big Four" have put factories in Canada. They want an allotment on their domestic production before they move to Canada, and still keep their Canadian production.
>
> In Section 2 of Article X, it provides that no new shaping machinery can be added in the industry by any member until the entire industry has operated at 80 per cent of its present shaping capacity continuously for six months. If

(*) See transcript of hearing, pages 318-337

> the small concerns utilize their shaping machines to the utmost, they cannot expand until the big members who have emigrated part of their business to Canada, have 80 per cent of all their idle machines in operation. It shows the attempt of those who have dominated the industry to continue that domination under the protection of restrictive law.

Mr. Woosley of the new National Pencil Company then stated that after being in business for only three months, his concern would have no chance under the allocation plan, particularly in view of the antagonistic attitude of the "Big Four".

Mr. Elmer of the Eberhard Faber Pencil Co. then stated that the allocation proposal was a sacrifice on the part of the large concerns, in favor of the small concerns, at their request, for their protection.

The Mail Order Association of America, in a letter previously referred to, objected to this provision on the ground that the prohibition against new shaping machines penalized efficiency of production and distribution, and tended toward monopoly.

The Consumers' Advisory Board in a memorandum dated December 14, 1933, advised deletion of the proposed allocation article in its entirety, as not a natural resource industry, and makes the consumer foot the bill for inefficient as well as efficient enterprises. (*)

The Musgrave Pencil Co. in a letter dated November 28, 1933, points out an objection to the allocation plan, (**) which might be summarized as follows:

> Where a deficiency shipper (one who has not fulfilled his quota under the plan) receives an order from another manufacturer who has exceeded his quota, he loses his identity on such deficiency shipments as he would not stamp his name on such pencils. This is highly important to the manufacturer from the merchandising point of view, and a matter which will affect his future.

Frank H. Beck of the Empire Pencil Company wrote that the proposed allocation is unfair to his firm, and would make him dismiss two-thirds of his employees. (***)

(*) See Deputy's files - Volume B-2, page 156.

(**). See Deputy's files - Volume B-2, page 123.

(***) See General file - folder 333, protests.

A letter from R. R. Yates (bank supplies), Joliet, Illinois, objected to proposed allocation of production, stating that as a distributor, he would require for the protection of his customers an affidavit from the manufacturer that the pencils were made in his plant. (*)

The Code Authority, in a brief answering a petition by two small manufacturers for certain amendments to the Code, (**) stated that the charge of vicious allocation attempted in the original proposed Code was a misstatement; that this allocation was not intended to perpetuate monopoly, as charged, but was agreed upon at the request of the smaller units of the industry in an effort to protect their volume; that this is simply another instance of divergent views of the small units of the industry in the South as against those of equally small units elsewhere; that those in the North saw and still see the protective value of the allocation proposal; and that this section was dropped at the request of the Legal Division, not because it was vicious, but because its legality was doubtful in the absence of complete agreement.

The Code proposed by certain small manufacturers and importers, referred to above, did not contain a provision for allocation of production.

Standards for industry products were provided for in Article VIII of the Code, such standards to be those approved by the Bureau of Standards of the Department of Commerce. Inasmuch as it was charged, as will be seen below, that these standards were linked to price control, the subject is of interest in connection with this study.

The following excerpt is taken from Code Authority Bulletin No. 26-34, dated August 31, 1934: (***)

> "The simplification - standardization schedule has been approved and the effective date has been set. This is the successful culmination of seven years effort. Violation of the provisions of this schedule now becomes a violation of the Code. It is expected that decisions on the other matters pending will soon be reached. Just so fast as this process can be made to go, does the industry obtain an operative Code, which the Code Authority can administer."

(*) See General files - folder 333, protests.

(**) See Deputy's files - folder 2.

(***) See Deputy's file - publications folder.

In a Code summary dated March 26, 1935, the Consumers' Advisory Board stated in part as follows: (*)

"(1) The schedule submitted and approved by the Bureau of Standards laid down the specifications which should prevail for each retail price class of pencils. For example, the 5 cent pencil should be made only in yellow color with rubber eraser and gilt tip. On June 22, 1934, the Consumers' Advisory Board recommended approval of the proposed simplified practice recommendation, not finally, but as a basis for experiment and observation. The Board also recommended that the simplified practice recommendation should be taken out of the hands of the Code Authority and the Lead Pencil Institute and placed in the hands of a standing committee including representatives of distributors, dealers, and consumers, as well as the Institute, organized under the procedure outlined by the Bureau of Standards to handle complaints. On August 21, 1934, the schedule of simplification and standardization was approved by N.R.A.

"(2) On November 8, 1934, the Code Authority requested that yellow color be omitted from the simplified practice schedule in view of the fact that orders for cheap pencils in yellow color had been accepted by many members of the industry before approval of the schedule. As the schedule is drawn, however, it is without effect except in conjunction with minimum prices, which were not approved. Thus the above request was unnecessary in order to release the members from the provisions of the simplified practice recommendations."

Objection to the standardization and simplification program of the Code Authority was voiced by two small manufacturers (Empire and Musgrave Pencil Companies) in a petition for amendment of the Code, as follows: (*)

"Petitioners do not wish to be understood as desiring to lower standards of quality or to oppose 'standardization' when fairly administered in the public interest, and therefore petitioners, instead of asking that 'standardization' as embodied in Article VIII be stricken from the Code, we merely ask that Article VIII be amended by inserting a comma in lieu of the period at the end of Section 1, and adding the following:

'Provided that nothing herein shall be construed to prohibit the use of color or design in any class where such use does not lower the quality of the product or increase its cost of production.'

"The following actions of the Code Authority (controlled by the 'Big Four') clearly demonstrates the necessity of adopting the above amendment to Article VIII, in order to protect the rights of petitioners and to safeguard the public interests:

"As, for example, the action of the present Code Authority

(*) See Consumer Advisory Board files - folder B

in seeking to actually make it illegal for petitioners to paint their most popular pencil, viz: Class 1, Type 5A, (a sharp competitor of the five cent pencil put out by the 'Big Four') any attractive colors, such as yellow, orange, white, gold, silver, or 'dipped mottle.' This action of the Code Authority is without justification or excuse, the sole object being to hurt petitioners' business by killing the sale of one of their leading pencils that competes sharply with the five cent pencil of the 'Big Four' and is in fact as good a pencil, although it sells for less than five cents.

"Or take for example the action of the Code Authority in trying to prevent the petitioners, through the Government and under the sanction of the law, to paint another of their most popular sellers, viz: Pencil Class 1, Type 5B, any of the more attractive colors.

"The 'Big Four' emboldened by their complete control of the Code Authority, actually appear to believe that they own all the attractive colors, such as yellow, orange, gold, silver, 'dipped mottle', and other attractive colors, just as if they had same copyrighted, and through the action of the present Code Authority are actually trying to reserve all of the best colors for their sales leaders, and to deny the petitioners the right to use attractive colors on the pencils which petitioners manufacture and which enjoy the best sales, and compete most sharply with the 'Big Four'. A significant fact to be noted in this connection is that 80 per cent of all pencils sold are painted yellow.

"Other instances of rank oppression and unwarranted discrimination against petitioners by the present Code Authority under Article VIII is shown by their limitation of color and other limitations on pencil Class 1, Type 3. The major portion of the business of the petitioners is done on the pencils just cited, all of which compete with the five-cent pencil sold by the 'Big Four' at two or three times the profit which petitioners made on their pencils.

"One of the means whereby petitioners have been able to stay in business and to compete with the nationally advertised products of the 'Big Four' was by making a pencil equal to, or superior in quality to those sold by the 'Big Four' and at the same time catering to the public taste by varying the color and design of their pencils to meet the requirement of customers.

"Section 20 narrows and restricts the operations of the small producer and compels him to conform to the practices of the 'Big Four' as exemplified in the schedule promulgated under the guise of 'simplified practice standardization' already referred to in discussing the amendment to Article VIII.

(Note: Amendment and reasons referred to are as follows: Add to Article VIII 'Provided that nothing herein shall be

construed to prohibit the use of color or design in any class where such use does not lower the quality of the product or increase its cost of production'.)

Reasons for amendment: 'The main purpose of Article VIII is to furnish a frame upon which to hang 'price fixing'. The framework for price fixing as designed under Article VIII by the present Code Authority being represented by Bulletin No. 4-34, entitled 'Description by Classes and Types of Wood Cased Lead Pencils' and issued March 21, 1934.

"To illustrate, the following excerpt is taken from Code Authority Bulletins No. 4-34:

"In order to avoid the possibility of any confusion to the industry, pending the issuance by the Department of Commerce of the approved standards, under Article VIII, the enclosed bulletin of the Code Authority beiefly describes the important features differentiating the various classes and types on which its fair minimum prices were ascertained.

"Group C - Pencils packed in one or two dozen easel stands.

1. No tipped and rubber pencils of a quality lower than Class I, Type 8, or Class II, Type 8, are put up in one dozen or two dozen easel stands.

2. No easel stands are used for colored pencils of a quality lower than Class IV, Type 4 (service charge of 50 cents net per gross of pencils is made for one dozen easel boxes. Service charge of 90 cents net per gross of pencils is made for two dozen easel boxes.

3. No copying pencils below Type 2 of Class V are mounted on cards."

The Code Authority replied to this petition, as follows: (*)

"Article VIII merely authorizes the Code Authority to adopt a simplification-standardization schedule when it is approved by the Bureau of Standards. What shall go in or stay out of such a schedule, the Deputy Administrator ruled was not properly a part of the Code making process. Such an amendment as is proposed is no proper part of the Code. It is merely an effort to get the Administrator to reverse his decision on this point and to take the subject away from the Bureau of Standards.

"The petitioners' argument shows that they labor under another severe misapprehension. Ignoring again as the

(*) See Deputy's files - folder 2.

> custom is, five manufacturers outside of Tennessee who are not national advertisers, they assume that the four larger manufacturers nationally advertise all their pencils and that consequently there is an established consumer demand for all pencils produced by these manufacturers by name or brand. The truth is that these four companies advertise their 5 and 10 cent pencils only. All their cheaper linescompete on a price basis with the products of all other companies. These four companies, at an enormous, advertising expense to themselves, have created a market for the five cent pencil identified with certain visual identification marks, which the standardization schedule will protect from cheap imitations. Under the schedule it will no longer be possible to chisel the 5 cent pencil market, deceive the consumer and drag down the industry price average. If anyone can make and sell a 5 cent pencil with the standard colors, etc., it is open to them to do so."

At a public hearing held June 5, 1934, to consider a minimum price schedule proposed by the Code Authority, Dr. Paul Nystrom, President of the Limited Price Variety Stores Association, stated that this industry is not very important and it couldn't be particularly harmful to let them get away with what they want, except for the precedent it would set for other more important industries. If industry expects society to guarantee industry a net profit, society must then carefully regulate industry.

The 5 and 10 cent stores have had a large trade on pencils sold at less than 5 cents each, particularly penny pencils, to people of low purchasing power. The proposed standardization seeks to reduce the sale of such pencils by prohibiting the use of desirable colors. During the past 15 years there has been a development in taste and selection, so that it is an important factor. Of course, standardization is good when it reduces wasteful numbers and items, but not when it hurts one type of item in its competition with another type. (*)

The files contain letters from three of the four "importers" stating that they will accept the proposed simplified practice recommendations, provided that they are included under the Code and given equal representation on the Code Authority. (**)

A letter from the Empire Pencil Co., a small manufacturer with only 25 pencil numbers, protested against the standards proposal, stating that it would permit large manufacturers to monopolize the industry. It states, however, that it would be a good idea for large manufacturers with 200 or 300 numbers to simplify somewhat. (***)

(*) See transcript of hearing, pages 50-63.

(**) See Deputy's file - Volume B-2, pages 64, 66 and 79

(***) See Deputy's file - Volume B-2, page 80.

The letter from R. R. Yates, referred to above, states that the standard proposals attempt to limit the types of blanks for advertising purposes, while the advertiser whould be given a wide choice. States that this is another discrimination against domestic trade as it does not apply to export trade. (He objects generally to Article X, Section 23, which provides that nothing in Article X shall apply to export trade, on the ground that it discriminates in favor of foreign customers who buy at real competitive prices, while the domestic customer has to take what they give him under thier own terms and rules. However, he is mistaken in thinking that Article X, Section 23, applies to Article VIII, "Standards".)

The files contain a letter from the Code Authority to the Bureau of Standards, dated November 15, 1934, requesting that the Bureau modify its order promulgating Simplified Practice Recommendation R 151-34 (concerning this industry) to postpone until further order the operation of provisions prohibiting the use of yellow color on certain named pencil types, because chiseling manufacturers made so many non-conforming contracts prior to, but in anticipation of the order, that it would place other manufacturers under an unfair discrimination and disadvantage. (The files do not show the outcome of this request.) (*)

Restrictions upon Advertising.

The Code contained three provisions which, while not specifically concerning any of the special topics of study, are of interest in connection with this study of factors affecting the distribution of the products of this industry. These provisions are Article VII, Sections 19, 25 and 26, quoted below:

> "19. No member of the industry shall furnish printed pages or insert sheets, whether in color or in black and white, for cutomers' catalogs for distribution to their trade. Pages for insertion in the catalogs of customers' salesmen, printed in black and white only, may be furnished without charge."
>
> "25. The use of color in printing member's or member's sales agent's catalogs shall be restricted to the cover and back pages of such catalogs. The inside pages shall be uniform in ink and paper throughout.
>
> "26. No member and no member's representative shall make any exhibition or display of his or its products at any trade convention or meeting of wholesale and/or retail dealers. Exhibits or displays may be made at special conventions or exhibitions, educational or otherwise, for the purposes of consumer information."

At the public hearing on November 6, 1933, Mr. Hall, on behalf of the Code opponents, stated that the reason for recommending deletion of these three provisions was because they would eliminate all forms of advertising except the most expensive, which would give the big companies

(*) See Labor Advisory Board files.

even more of a monopoly and would eliminate the small concerns.

Mr. Best, one of the smallest manufacturers present, stated that he was in favor of the Code and did not think it had a monopolistic tendency.

Colonel Gaskill of the Lead Pencil Institute then answered Mr. Hall's criticism, stating that there was great waste in giving colored pages to deales and doing other things for them, and that the industry wanted to stop this waste; that without these provisions the smaller manufacturers would be compelled to compete with larger and wealthier manufacturers in a warfare of expenditures in that advertising field.

Mr. Fabor then answered Colonel Gaskill by stating that at first he too, thought it was purely an economy measure, but that the Colonel had failed to develop the point that the provisions do not limit color advertising except in dealers' catalogues, thereby permitting effective color advertising by wealthy manufacturers who can afford it, in such national mediums as the Saturday Evening Post. He further stated that these large manufactures can also afford to buy handsome lithographed displays in large quantitites for dealers to put in their windows.

> "We, as a small company, are not in a position to compete with them in that kind of advertising. On the other hand, we have goods to sell which are colored goods. In our line we have three different lines of colors, one with 64 colors or shades of color, one of 30, and one of 27. It is obvious that the only way you can properly illustrate colored merchandise is in colors. It is within our reach to have pages printed in color, or lithographed in color, in a comparatively small quantity, but large enough to permit us to distribute some of those to dealers who are selling these color numbers ****. The dealer, who is in that case principally an art dealer, binds that into his catalog, so that it will always be there for ready reference to the consumer. If we are barred from supplying that for him, naturally he cannot with that small quantity which he would want for such a purpose, lithograph and put into his catalog, those sheets.
>
> "We feel, therefore, that by excluding us from the privilege of showing our goods in color, in the consumers' catalog, which is the only means open to us, but at the same time not limiting the larger manufacturer from illustrating his goods in color, whether it be in a periodical or a lithographed window display, that that constitutes unfair competition."

Colonel Gaskill then stated that as Mr. Fabor was one of the importers, he would not be subject to the color restrictions if not under the Code, to which Mr. Fabor replied that the boycott created by other Code provisions would prevent dealers from handling his goods if they conflicted with Code provisions. (*)

(*) See transcript of hearing, pages 289-298.

The Mail Order Association of America, in a letter referred to above, stated that these advertising provisions seemed unduly restrictive, and conductive to a shift in concumption away from wood-cased lead pencils to other kinds of writing equipment.

The William Byrd Press, Inc., Richmond, Virginia, wrote on November 16, 1933, to state an objection to these provisions which forbid the use of color in advertising colored pencils. The letter states that the restriction is unfair, and that if a manufacturer can live up to the provisions of his Code and sell his products at a price which permits effective advertising, he should be permitted to do so; that these Code provisions do not control unfair trade practices. (*)

The files also contain a memo from B. A. Brennan of the Industrial Advisory Board to T. R. Taylor of the same office, suggesting a non-committal answer to the letter from the Byrd Press. The memo states that this letter was incited "by the opposition (*) who are a small minority", who it is believed in many cases will not be entitled to Code membership; that any other answer would "add fuel to the fire" and enlagre the differences between the two factions. (**)

Classification of Members of the industry is accomplished by Article IX of the Code, which provides that "Class A" members are those members with 15 per cent or more of the industry volume each; "Class B" members being those members with between 5 per cent and 15 per cent each; and "Class C" members being those with less than 5 per cent of the industyr volume each. This classification is used in several of the Code provisions in varying restrictions on the manufacturers concerned, such provisions and use of the classification being pointed out under the special topics concerned. (For a list of members according to classification, see Part I, "General Industry Data.").

Reports of Code Advisers.

As for reports of the various Code advisers, theri recommendations are included at appropriate points throughout this report in connection with the particular topic of discussion. However, the files contained comparatively few reports from Code advisers.

The advisers took the following positions in their final reports at the time the Code was transmitted to the Administrator for approval:

Legal Division: Approval in full.

Labor Advisory Board: Approval in full.

Industrial Advisory Board: Approval in full.

Consumers' Advisory Board: Strongly advised against approval.

(*) See Deputy's files - Volume B-2, page 87

(**) See Deputy's files - Volume B-2, page 97

of this Code, particularly recommending deletion of entire Article X. (The objections of the consumers' adviser have been completely covered elsewhere in this report.)

Research and Planning Division: No objection made to the Code, although the adviser seems to fear the results of the marketing plan, and speaks of giving it a trial period. His report of February 9, 1934, quoted in full states:

> "As regards the marketing provisions in the proposed Code for the Wood-cased Lead Pencil Industry, our division has committed itself verbally as regards these provisions. Mr. DuBrul, former Chief of the Division of Economic Research and Planning, in conference with representatives of the industry, called me into the conference and after a lengthy and searching discussion of these provisions, threw it into my lap to follow through.
>
> "The Code at that time carried allocation provisions, also, but these were definitely and bodily removed from the Code with the consent of the industry representatives. It was felt at that time that such provisions were inadvisable.
>
> "The marketing provisions, however, after careful consideration and deliberation, were felt to be equitable and necessary, and because of the nature of demands from the consumer and because of competition with mechanical pencils, certain types of which sell for a very narrow margin above quality wood-cased pencils, it was felt that these provisions would not work to the disadvantage of the consumer. On the contrary, it was felt that it should work to their advantage inasmuch as quality would become more of a factor in competition than price.
>
> "Mr. Dubrul suggested that the marketing plan be put, if too strenous objection presented itself, on a trial basis, at least for a period of nine months, to determine the soundness and equitableness of the plan.
>
> "Following through this suggestion in later conferences with representatives of the industry, the marketing provisions were amended, modified and changed to eliminate undesirable features and in its present form it seems to parallel the type of modified plan that was discussed with Mr. DuBrul.
>
> "It might be well to point out, also, that the standardization provisions for pencil products interlace with the marketing plan and this is decidedly to the advantage of the consumer from the quality standpoint previously discussed.
>
> "The spectre of excessive prices and of a coagulated distribution system, as a result of the marketing plan, looms more formidably than the actual character from which it is cast."

B. Types of Trade Practice Regulations Affecting Distributive Relations.

1. Customer Classification

In Article II, "Definitions", the Code contained several sections defining and classifying types of customers. These sections read as follows:

> "5. The term 'Dealer' shall include each of those who is regularly engaged in the wholesaling and/or retailing of wood cased lead pencils (except blanks) in the ordinary course of business. This shall not include the sale of pencils for use as advertising.
>
> "6. The term 'Distributor' shall include each of those purchasing pencils in blank form and reselling in that form and/or imprinting or stamping such blank pencils and reselling them for advertising purposes.
>
> "7. The term 'Consumer' shall mean any purchaser of wood cased lead pencils who is not a dealer or distributor as defined above. Commissaries and other buying agencies operated by corporations or groups of corporations for the procurement of supplies for their own use, and boards of education, are included.
>
> "8. The term 'Sales Agents' or 'Agent' shall include each of those who or which shall serve the members of the industry in the distribution of wood cased lead pencils to dealers, in the same capacity as the members' sales departments. Such agents shall be appointed only in accordance with regulations adopted by the Code Authority and approved by the Administrator."

It will be noted that the term "dealer" includes both wholesalers and retailers. The reason for this classification is stated at length in the letter of transmittal from the Lead Pencil Institute to the N.R.A. (set forth later under the heading "Resale Price Maintenance", at which point in the report are discussed the marketing distinctions affecting customers of different classes.) At the public hearing held November 6, 1933, Colonel Gaskill of the Lead Pencil Institute stated that the term "distributor" has through custom received a peculiar significance in the industry, denoting the man who handles blank pencils, which reach an entirely different field than do printed pencils (Transcript, p. 40.)

As will be seen from the definition quoted above, the term "consumer" is used to denote any buyer, large or small, who purchases pencils for his own use. This definition should be kept in mind in later pages wherein direct sales from manufacturer to consumer are discussed.

The provision relating to "sales agents", quoted above, was inserted

in the Code by its proponents at the time of the public hearing. In Part I, the controversy concerning the question of whether certain importers who have pencils made for them by contract should be admitted under the Code as members of the industry was set forth at length. At the public hearing, Mr. Winston, who represented this group of importers, stated that this proposed provision defining "sales agents" was an attempt to control the activities of these importers without giving them any voice in proceedings as industry members. (*)

It will be noted that the provision provides for regulations governing the appointment of sales agents to be adopted by the Code Authority with the approval of the Administrator. Such regulations were later drafted by the Code Authority and submitted to N.R.A. for approval.

Following are the regulations proposed by the Code Authority: (**)

> "Pursuant to the powers conferred upon it by Sec. 8 of Art. II, the following regulations are adopted by the Code Authority:
>
> "1. No sales agency shall be created except upon a written contract which may be an exchange of letters, between principal and agent, establishing the following facts:
>
> "First, that the products to be sold by the agent are the property of the principal at all times until delivered to a customer.
>
> "Second, that the agent will sell such products only at prices and upon terms dictated by the principal.
>
> "ubject to these two essential conditions, the contract may provide for a stock of the principal's products to be carried by the agent and may permit the agent to bill customers direct, locating the credit risk as the parties may determine. No such contracts shall permit a sales agent to undersell the principal's price list as the same may be on file with the Code Authority.
>
> "2. Sales agencies may be either general or special. A general sales agency may be created between a manufacturer and any selling organization which is not directly or indirectly engaged in business as a wholesaler, retailer, or buying syndicate, for the purpose of selling the manufacturer's products to other dealers than the agent or his or its affiliates. All general sales agency contracts shall be reported to and be subject to the approval of the Code Authority.
>
> "3. Special sales agency contracts may be made with any wholesaler or retailer at any time for the particular purpose of authorizing bids to be made on any individual, federal, state,

(*) See transcript of hearing, pages 239-241

(**) See Labor Advisory Board files.

cipal or board of education contract, subject to the provisions of paragraph 1 of these regulations. No such special agent shall be allowed or paid more than 10 per cent of the net value of the products thus sold at the manufacturer's minimum consumer prices, as commission or compensation. No such special agent shall be authorized to bid or quote prices lower than the principal's consumer list prices then on file with the Code Authority subject to all applicable discounts. The payment commission to the agent within the limit above stated, shall not be deemed to be a violation of the minimum price provisions of this Code.

"4. No special sales agent shall be authorized to or permitted to deduct in advance, the two per cent cash discount on any proposal for pencils to be supplied under any federal, state, county, municipal or board of education contract, bus such discount shall be allowed by the agent if payment is made by the purchaser in cash within ten days from the date of the invoice or ten days E.O.M. as provided in Section 7 of Art. X of the Code. No bid made by a special sales agent in which a cash discount has been deducted in advance, shall be accepted or filled by the manufacturer for whom such special sales agent is acting.

"5. Section 5 of Art. II shall then be interpreted as follows: Any person, firm and corporation which is the duly accredited domestic representative of a foreign wood cased lead pencil manufacturer and which imports and sells foreign-made lead pencils under the foreign manufacturer's name and brand, in the domestic market and which also imports foreign-made pencil leads for pencils to be domestically produced for it and sold by it in the domestic market, shall be classified by the Code Authority as a foreign manufacturer's representative.

"6. Sections 4, 5 and 6 of Art. X shall be interpreted as follows: If any member of the industry shall contract to manufacture wood cased lead pencils on behalf of a foreign manufacturer's representative in the assembly of which foreign-made pencil leads supplied by the foreign manufacturer's representative are used, the performance of such contract shall not be construed to be a sale to a dealer, distributor or consumer as defined in Art. II nor subject to the minimum price provisions of this Code if the foreign manufacturer's representative as an essential part of its contract with the domestic manufacturer, shall agree to conform with the provisions of Articles VII and X of the Code and the duly authorized interpretations and regulations of the Code Authority applicable thereto, with reference to the sale of the pencils so produced, in the domestic market. Provided that no such contract shall be made until the member shall have obtained from the Code Authority an approval of the status of the contracting purchaser as a foreign manufacturer's representative, as defined herein."

In the letter of transmittal accompanying the above regulations, Colonel Gaskill of the Code Authority, stated: (*)

(*) See Labor Advisory Board files.

"For many years it has been the practice of some of the manufacturers in this industry to bid on governmental and large consumer contracts, through dealers who are authorized to act as manufacturer's agents and are paid a commission for their service. Other manufacturers follow the practice of bidding on these contracts direct. The difference in policy really reflects the establishment of trade relations with dealers by some of the older and larger manufacturing units as distinguished from those manufacturers coming more lately into the industry who have not established dealer relations to any marked extent. The object of the group following the policy of bidding through dealer agents generally may be summarized as, (1), a policy of not selling competitively against their dealers; (2) a desire to hold their established dealer relations by paying a commission to dealers for acting as agents in such transactions; (3), to utilize to the fullest extent their field selling force as an aid to dealers and to themselves. It should be said, however, that this policy is not uniformly followed by all the larger manufacturers, some of whom bid through agents. Historically, however, the agency method of selling on large contracts, governmental and consumer, is firmly established in the industry.

"Difficulty arises out of this practice because it is exceedingly difficult between legal special agency transactions in particular contracts upon which a commission can legitimately be paid (which was the original concept of the practice), and the deviation from it which is due to some manufacturers calling particular dealers their selling agents, disregarding the legal principles of agency and actually selling to these dealers at a price which includes deduction of a general 10 per cent commission on what are actual sales to these dealers for stock.

"Prior to the establishment of the Code with its open price provisions, this situation presented sufficient difficulties because these so-called agency relations which violated every legal principle of agency, were the cover for secret discounts or rebates. And there was no method open to the industry of protecting either itself or its dealers from what was in reality an unfair disparity in purchasing relations as between dealers.

"With the approval of the Code and its open price provisions (regardless of any minimum price schedule), it becomes necessary in the administration of the Code and in particular with relation to Art. VII, Sections 8, 9, and 14 and Art. X, Sections 1, 2, 3, 4, 5, 6, 7, to establish the legal use of the agency relation which requires the possibility of preventing the fictitious use of the agency term. This must be done in order to prevent violation of the open price provisions of the Code and the regulations against price discrimination and secret rebates. It is necessary to outlaw the fictitious agency practice if the filed price lists are to have any meaning.

"With reference to that part of these sales agency regulations

which applies to what is known in the industry as the 'imported group', consisting of A. W. Faber, Inc., J. S. Staedtler, Inc., Koh-i-noor Pencil Co. and Swann Pencil Co., a peculiar and differentiating condition exists which also must be explained to be understood. These four companies are domestic representatives of foreign manufacturers of lead pencils whose products are imported into this country. The imported products are generally high quality, high priced pencils. But it has been the practice of these four concerns to have cheaper pencils made for them by American manufacturers, for which these importers supply their own leads which they have imported from abroad. By reason of this fact, members of this importer group stand in a dealer relationship to the foreign manufacturers which they represent, act as local jobbers for these foreign products and also act as jobbers of the products which are made for them partly as their own materials, in the U. S. So far as this domestic relationship is concerned, they are not manufacturers and their effort to be included within the Lead Pencil Code as members of this industry upon the allegation that they were manufacturers, was denied at the time the Code was approved. With relation to the pencils made for them in the U. S., they are both contractors for a finished product and sub-contractors with reference to an essential part of their own materials. In this respect, they are to be differentiated from the rank and file of American distributors who simply purchase a complete material."

"In times past these importers have very largely had their cheaper pencils manufactured for them by the Red Cedar Pencil Co. of Lewisburg, Tenn., one of the smaller units in the industry. This company has a peculiar selling method, depending more upon a small group of jobbers than upon direct sales connection with the trade or the consumer. If Red Cedar Pencil Co. is obliged to sell to this importer group at the same terms on which it sells toretailers or to the consumer under the open price provisions of the Code, or to establish a uniform price applicable to these importers as to other buyers, two results will follow.

"First, the Red Cedar Pencil Co. will practically be ruined. Second, these importers will establish a domestic pencil factory and add to the existing over production capacity of this industry."

The Code Authority later requested permission to withdraw these proposed regulations (without stating any reason for this request), this permission being granted and the files on the subject being returned also. Thus, more information upon this subject may be available in the Code Authority files. However, the files do contain memoranda from the legal and economic advisers criticizing these proposed regulations, quoted below. (*) The legal adviser, Vaughan, makes one statement of particular interest at this point, his criticism of Paragraphs 5 and 6, concerning the "importer" group.

(*) See Deputy's files - folder 25B.

Report of legal adviser:

"1. The regulations as a whole are extremely detailed and impose very drastic curtailment upon the rights of members of the industry in connection with the distribution of industry products. It would seem that the granting of commissions to other than bona fide sales agents has become a common means of price cutting in the industry and it is for that reason that some form of regulation is desired by the Code Authority. I question whether or not we should go to the extent requested by the Code Authority in regulating sales agents."

"2. Paragraph 2 states that no one who is directly or indirectly engaged in the business of wholesaling or retailing may be employed as a sales agent." (The legal adviser does not see any unfair competition in a wholesaler or retailer acting as sales agent even though subterfuge might result; unreasonable regulation.)

"3. Paragraph 2 further states that a general sales agent may not sell to his own affiliates." (The legal adviser feels that the word 'affiliate' should be defined.)

"4. Paragraph 2 further states that all general sales agents be contracted subject to the approval of the Code Authority." (The legal adviser thinks that this is too great power in the hands of the Code Authority, which cannot be an impartial agent in any event.)

"5. Paragraph 3 states that a special sales agency contract may be established for the purpose of bidding on any particular federal, state or municipal board of education contract." (The legal adviser does not feel that this practice attempted to be abolished is an act of unfair competition.)

"6. Paragraph 3 states that a sales agent may not receive more than 10 per cent commission." (The legal adviser brings up the question whether this percentage is reasonable and states that it requires more thorough development before approval. He furtherstates that his opinion is that there is a fundamental objection to the limitation of commission. He does not feel that any commission, even though exorbitant, would seem to constitute unfair competition.)

"7. The first sentence of paragraph 4 is subject to the same criticism as contained in the paragraph immediately preceding. If the agency is a true one, the discount should not be regulated and if the agency is not a true one the advanced deduction of the 2 per cent discount would constitute a violation of the Code in which situation no further regulation is necessary."

"8. The import of the second sentence to paragraph 4 is not

entirely clear to me. The sentence is phrased so badly that it would seem to permit the following result: If a manufacturer violates the first sentence of paragraph 4 in a sales agency contract, it would seem that at a later date he might at his option deny liability under the contract owing to the second sentence."

"9. Paragraphs 5 and 6 purport to be interpretations of certain sections of the Code, whereas it is questionable if they do not in fact constitute an elaboration and extention of the Code. Paragraph 5 sets up an entirely new clasification of dealers, those dealers who are representative of fine pencil manufacturers who also import lead to be encased by domestic manufacturers), and paragraph 6 purports to grant exemption to this classification from certain pricing provisions of the Code. In the first place these paragraphs do not seem to have any relation to the appointment of sales agents."

In conculsion, the legal adviser points out that in his opinion, these regulations are too detailed and drastic. He feels that it would be far better to adopt a few simple regulations getting to the heart of the bona fide sales contract and agent.

Report of economic adviser:

"1. Section 1 provides in one paragraph that title to a product is to remain in the principal's name, yet paragraph 2 of the second part of Section 1 states that the credit risk may be located in either the principal or agent. These two paragraphs seem to be inconsistent.

"2. Section 3 provides a maximum commission that may be paid to special sales agencies, a provision to which the research and planning division is opposed.

"3. Section 4. This section fixes a maximum cash discount which may be allowed by special sales agencies. This division strongly opposes the fixing of discount either maximum or minimum. This section also provides that no manufacturer shall accept or fill orders if the cash discount is allowed in advance. It appears that if the purchaser acting in good faith and the special agent lead the purchaser to believe that the deduction of the cash discount in advance was within the scope of the agent's authority, the principal would be liable to the purchaser."

The Research and Planning Adviser points out that Section 4 and 5 are interpretations outside the scope of the sales agency regulations and in effect amount to amendments rather than interpretations.

(Inasmuch as no title passes from "principal" to "agent", so that there is no "sale" which gives the agent the status of "customer", it may be wondered why "sales agents" should be considered under the subject of customer classification. However, the attempt under this

Code to consider certain agents as "customers" and the effort to prevent customers from obtaining special discounts as "agents", makes this a pertinent subject for consideration at this point.)

Article X, Sec. 13 of the Code provides that the Code Authority, with the approval of the Administrator, shall prescribe such regulations as it shall deem proper by which the question as to the classification of any "purchaser or prospective purchaser" shall be determined, and shall arbitrate all such disputed questions. There is no information in the available files concerning this provision. This provision was one of those suspended by the Administrative Order approving the Code, and this suspension never having been lifted, the Code Authority never had an opportunity to act under it.

Sections 3, 4 and 5 of Article X provide for open price filing (the filed prices to become effective immediately upon filing) and for a schedule of minimum prices which can be filed, these minimum prices to be ascertained by the Code Authority, subject to the approval of the Administrator. These provisions are discussed in detail in a later section of the report, but are mentioned at this point due to the fact that the filed prices take into account the customer classification established by the Code. The minimum price schedules proposed, but not approved, provided one scale of minimum prices for dealers and another for consumers.

Other provisions have an effect upon the customer classification, but are of more direct interest in connection with other topics of discussion, so will not be mentioned specifically under this topic.

2. Resale Price Maintenance.

The Code (Article X, Sections 14 and 15) provides for resale price maintenance. These two sections were among those suspended in the Order approving the Code, but later there was considerable agitation, pro and con, for the removal of the suspension of these and other provisions.

Section 14 provides that in the case of pencils which retail at 5 cents or less each, no member of the industry shall grant a greater trade discount than 25 per cent off list (the usual trade discount being 40 per cent off list) unless the purchaser agrees (among other things) not to resell the products to any consumer at less than the manufacturer's prevailing price to the consumer, and not to resell to any other dealer, distributor or agent except upon a like agreement.

Section 15 reads as follows:

> "In all sales of trade-marked or branded products to dealers for resale, members and dealers may, by contract, require purchasers to resell such products at the manufacturer's effective prices and discounts and may further require that is such products are thereafter sold by such purchaser for resale, the original

purchaser shall incorporate a similar provision in the contract with the purchaser for resale."

(The following information is not all directly concerned with the subject of resale price maintenance. However, the subject of resale price maintenance, minimum prices, and other terms and conditions of sale are integral parts of the complete "story" of price control as attempted by this industry. Therefore, for the sake of clarity, certain data is given at this point which will also be of interest - possibly more direct interest - under other subject headings.)

In the letter of transmittal of the Code, Colonel Nelson B. Gaskill, President of the Lead Pencil Institute, Inc., on behalf of the proponents of the Code, stated in part:(*)

"Trade Relations. The great problem which confronts the manufacturer of shelf goods is the maintenance of sound selling policies and prices. In that part of the distribution field which is the pencil manufacturer's outlet to the consumer, the strict wholesaler who sells only to the retailer has practically disappeared. Characteristically, the pencil manufacturer has to deal with combinations of the wholesale-retail function, with large and small retailers, the large consumer buyers, Board of Education and the like. There is no possible way of applying a trade discount to wholesalers because the strict wholesalers are too few in number and too hard to identify. Differentiation between them on a quantity basis fails because very many of the commercial (retail) stationers handle the larger quantities. If a wholesale-retail house gets a better price for any reason, than the retailer, it undersells its retail competitors through its own retail outlets. If the large retailer gets a better price than his competing retailers can get from their wholesaler, he breaks down the wholesaler's trade. So long as this confusion of function remains, no matter how soundly the manufacturer's price policy is constructed, it breaks down in the distribution field and either the wholesaler-retailer or the retailer will demand lower prices from the manufacturers. The other will follow.

"The loss of functional distinction in the distribution field, the disregard of differences in functional costs and margins and the constant pressure of prices downward as wholesaler or retailer secures a preference, create a chaotic condition which threatens the cost return both of manufacturers and distributors and always tends to force wages down.

"Since it cannot recreate the strict wholesaler, this industry, after a long and vain search for an alternative remedy, has determined that the only security is manufacturers and distributor alike and all the interest which depend upon them, is to base its selling policies and its selling prices upon the retailer. It is trying to cut the knot only because the tangle cannot be untied The industry has put itself squarely on one price to everybody regardless of what he calls himself. the quantity discount has been discarded because of its inevitable tendency to become preferential as well as to lead to overbuying and distress selling.

(*) See Deputy's files - Volume A, Page 28, et seq.

(Note: The inaccuracy of this statement is pointed out later on page 98. The Code certainly provides for quantity discounts.)

"The uniform discount off list is purposely ample for retailers both to compensate for the loss of the quantity and preferential discounts and to give room for the due return on such wholesaling service as will be rendered. On this basis it is not out of line with the Harvard School researches which were made on a lower labor cost.

"As a further comfort and assurance to the wholesaler, the manufacturers assume limitations which will tend to throw small retail accounts back into the wholesale trade channel.

(Note: For a more complete discussion of this limitation, see the section of the report entitled "Restrictions on Size and Manner of Making Shipments.")

And the manufacturers deny themselves direct consumer sales for the simple purpose of turning as large a volume of sales as possible through dealer channels.

(Note: Colonel Gaskill must mean a self-denial of <u>certain</u> consumer sales only, for the Code specifically contemplates direct sales from manufacturers to consumer, as for example,

Article X, Section 8, which sets forth the maximum quantity discounts for such sales.)

"Unless the dealer's margin is preserved, the sale of pencils becomes unprofitable both to the dealer and the manufacturer. In prescribing dealer's resale discounts off list, this industry is endeavoring to protect the dealer's margin upon which the payrolls of both dealer and manufacturer depend. These discounts are scaled upon quantity purposely to avoid flat resale price maintenance and to give the efficient dealer an opportunity to vary his quotations either on large contracts or on a larger volume of business. But in so doing, the dealer will be charged with the protection of his own margin which will not be cut from under him by one manufacturer quoting special prices to his competing dealers.

"There will be protest against this arrangement by dealers who on one account or another have obtained special preferences in the past. All chiselers will object to it because they can only chisel with their own money. It will bear hard on some wholesalers. But there is only one way out for this industry, one method which in the long run will be in the best interest of all concerned. Once more, all the members of the institute have agreed upon a sales policy which in some degree, requires an immediate sacrifice of advantageous relationships from each of them.

<u>"Price Control</u>. It is utterly impossible for this industry now to attempt to guide or control competitive price making upon a cost limitation. Three years ago a survey was made of the cost accounting methods of this industry by a competent firm of cost accounts.

The objective was a uniform cost accounting system. The project failed, largely because of the installation, change over and operation of the new system was too great. The survey showed, however, that there was no uniformity of method and that to talk of comparative costs as between manufacturers was to indicate only their non-existence.

"There is another factor which complicates this problem. Pencils are one of those commodities whose resale price is fixed in the terms of fractional currency. This fixation is due to a consumer buying habit. Pencils can be sold in terms of so many for one cent or so many for five cents. Very, very few pencils can be sold at two cents each over the counter, less at three cents each and practically none at four cents each. The same is true when five cents is passed. The consumer mind then begins to think in terms of ten cents. These fractional currency quotations become price limitations in spite of all the cost systems ever invented. And working back from this limitation, the question whether a certain pencil is to be sold at one cent, two cents, two for five cents, five cents or ten cents, is wholly and solely determined by the price at which it is sold to the dealer. Thus a pencil which passes to the dealer around $2.40 per gross will very definitely be a two for 5 cent pencil. As it goes up past $3.00 it becomes a 5 cent pencil with a narrowing profit margin to the dealer.

"Two results appear as a consequence. There is a very narrow permitted range of price variation between manufacturers' prices to the trade. If $2.40 as a price for two for 5 cent pencils affords a proper margin to the dealer, a few cents more will so narrow the margin that no dealer will buy at that price while if it goes much lower, the pencil becomes a three for 5 cent pencil. The effect of this relation tends inevitably to concentrate manufacturer selling prices regardless of differences in cost.

"The second result is this. If all manufacturers have a common price of $2.40 for their two for 5 cent brands, the consumer suffers not a whit. He gets the pencil to which he is entitled at two for 5 cents. The only effect of the common price is (a) some dealer does not get an extra profit from a secret 5 or 10 cent discount; (b) no dealer is squeezed because some other dealer has a price concession which enables him to shade a 100 gross order by a few cents per gross.

"Consequently, since the price to the consumer is necessarily stated in terms of fractional currency and that is reduced to exactitude with reference to a particular type of pencil, by the price to the dealer, there seems to be no wrong or injury to the consumer if all manufacturers sell their two for 5 cent brands to the trade at the same price. The question which should interest the consumer is merely that the dealer margin is not too high.

" Here again the fractional currency enters. The price to the dealer on a two for 5 cent brand cannot be so high that it cannot be retailed at that price on a single pencil basis, at a profit to the dealer. And if the price to the dealer becomes low enough, the pencil simply ceases to be a two for 5 cent item. The real question is as to the

price which enables the dealer to secure the return of his own costs and a margin for profit on the transaction. The real use of cost accounting to the manufacturer under these circumstances, is not to set selling prices but to keep his costs within the limits which this arbitrary fixation of selling prices entails upon him.

" The proposal to fix common selling prices connects directly with another acute necessity of this industry. As has been demonstrated above, if this industry is to survive under a non-recoverable loss in gross sales volume, it must find a way to increase its sales return in dollars; in short, to raise its price average. To do this it must create and maintain a distinct quality value in its better grade pencils and differentiate these distinctly from the cheaper goods. Once more it is the price to the dealer which determines whether any pencil is to sell at 5 cents or 1 cent. All the advertising the world ever saw will not sell a pencil at 5 cents unless the price to the trade requires it. Consequently when the manufacturers ask for approval of a proposal to agree upon a price to the trade for a 5 cent pencil, what they are asking for in reality is that there shall be a 5 cent pencil which the consumer may buy or not as he pleases. And this would take nothing from the consumer who would continue to pay 5 cents for a 5 cent pencil, except the extreme likelihood of having some dealer sell him a two for 5 cent pencil instead of the real 5 cent pencil to which he is entitled.

"That most pencils are sold by the gross or dozen does not affect this argument. The quantity price is always controlled in the long run by the single sale which is the form in which most small retailers sell. When the price per gross from a dealer falls to a point where some sharp merchant can turn a quick penny by buying them and selling single pencils at a cut price, the whole per gross price structure will come down too. This price structure is kept up by the reverse pressure.

"Finally then, this industry believes that while this Code contains much that is novel, it is soundly economic and cannot be injurious either to the distributor or the consumer. If this Code meets with your approval, this industry will fully discharge its duty to labor."

In addition to provisions dealing directly with resale price maintenance, there were several other Code provisions dealing with minimum prices or price stabilization. Article X, Section 3, provided mandatory open price filing, with prices effective immediately upon filing, while Section 5 provided for filing revised price lists. Article X, Section 4, was the provision which caused considerable controversy, this provision reading as follows:

> "No member shall sell or quote in his or its price list or otherwise, any product of the industry at a price, which less the applicable standard discounts, shall be less than the fair minimum price thereof as ascertained by the Code Authority with the approval of the Administrator. Nothing in this provision or in any other provision of this Code shall be construed so as to permit the determination of minimum prices for any pencils retailing at the rate of more than five

cents each. The Code Authority shall reject any price list which does not conform to the provisions of this paragraph, and so notify the member filing it. Until it is corrected, such price list shall be ineffective and any sales made by such member which do not conform to an affective price list on file with the Code Authority, shall be deemed an unfair method of competition."

These three provisions were in effect until November 23, 1934, when they were suspended at the request of the Code Authority, after ineffectual efforts by the Code Authority to have their proposed minimum price schedule approved and other suspended provisions reinstated. (*)

In addition to the plan outlined by the Institute in its letter of transmittal (quoted above), the Code Authority later issued additional statements in explanation and support of their plan for price control.

A hearing was held on June 5, 1934, to consider the minimum price schedule proposed by the Code Authority to be established under the terms of Article X, Section 4. At this hearing, Colonel Gaskill and other members of the proponent group made the following statements: (**)

1. That the proposed prices were not based upon cost - impossible to obtain uniform cost data on individual items from a practical point of view.

2. That the price minimums suggested were the best that could be worked out, but still in certain cases would be below cost.

3. That the great increase in labor cost under NRA, and "chiseling" competition, made these minimums necessary - otherwise labor standards could not be complied with.

4. That in anticipation of minimum price restrictions in the Code, many advance orders were taken at lower prices than was expected would prevail under the Code - thus the last half of 1933 shows a sales increase - and probably an increase in the price average. About 60 per cent of the 1933 sales were made in the last six months, although a considerable part of the year's production was at lower wage costs prior to N.R.A.

5. That Deputy Paddock orally and by letter approved the price list established by the Code Authority in February, 1934, although they were never able to enforce it, Paddock's approval not being sufficient. Some concerns are following it - setting their prices high enough so as to not go below the minimums after giving the proper discounts. Some concerns are not following it (the opponents). Two companies use it as the minimum and maximum, discounts going below the minimum. Those who have not seen fit to follow the schedule have had an open market.

(*) See Deputy's file, folder II, etc.

(**) See transcript of hearing, pages 50-63.

6. That the proposed schedule is fair and equitable to all concerned. The consumer price is protected by his buying habit, and the price schedule provides a protection to manufacturers large and small and prevents below cost competition.

Just prior to the public hearing of June 5, 1934, the Code Authority submitted a brief advocating the approval of their proposed minimum price schedule. (*)

Part of this brief is discussed under "General Industry Data", Part I, Page A-38, and a further section of the brief (dealing with the necessity for separate minima for dealers and consumers) is quoted and discussed under "Price Differentials", Part II, page A-131. In addition to these statements, the brief spends several pages on the subject of the method used in composing a minimum price list, concerning the cost of materials used in making lead pencils (including a chart showing which companies produce their own materials, and the relative cost of each), pointing out the effect of the consumer buying, explaining why a cost method is not applicable in determining minimum prices in this industry and including a chart showing prices on various dates of interest - all of which information, with its more technical details, being of more interest to the N.R.A. research unit whose particular topic is "minimum prices." However, the following statement from this brief is of interest at this point:

"That variation in selling cost as between manufacturers is also extreme. It is the policy of some of the manufacturers selling principally lower priced lines to sell by mail or by the employment of commission salesmen, whereas other manufacturers, particularly those handling the full line, employ salesmen upon a full time basis, who are constantly at work, not only selling a particular manufacturer's line, but developing the wood pencil business as against other writing instruments, which results to the benefit of the entire Industry; but there is no basis of comparison of this selling cost expense which cannot be ignored, if the Industry is not to succumb to the advance of the competitive writing instruments."

The Code Authority made the following statements in a brief (parts of which are quoted elsewhere herein) in reply to a petition for code amendment filed on behalf of two small manufacturers of the opposition group: (**)

"The petitioners either lack understanding of the sales policy expressed in Article X or desire to misrepresent it. The policy in outline is as follows:

1. No uniform price fixing is intended or permitted.

2. Each member states his own prices as he sees fit.

3. The only limitation is that no one shall sell below the

(*) See Deputy's Files - Folder 20
(**) See Deputy's Files - Folder 2

minimum prices.

4. These minimum prices do not and cannot have the necessary relation to cost. A 5¢ pencil is a 5¢ pencil only if the price at which it is sold to the trade, plus the dealer's necessary margin, requires him to retail it across the counter at 5¢. To lower the trade price on a 5¢ pencil does not produce a cheaper 5¢ pencil to the consumer. It merely increases the dealer's margin for profit.

5. Standard credit terms, freight allowances are provided. Concessions are made to small manufacturers.

6. With the approval of the National Association of Wholesalers, Retailers and School Supply Houses, maximum quantity discounts to consumers buying direct, were established. These are permissive and apply to the members' varying list prices. These consumer discounts do not fix prices. They merely prevent chiselling large consumer contracts with secret discounts.

7. In the same way, a standard trade discount of 40% off list was established. The rate is uniform but the member's list prices to which it applies may vary.

8. A cumulative quantity discount rate may be established which will allow small manufacturers to give the same discount on smaller quantities as large manufacturers may quote to certain large buyers. Still the uniformity applies to a variable base price list.

9. The provisions relating to blanks and advertising imprints can be of no interest to the consumer since advertising pencils are given away free by their purchasers.

10. Section 14 does not fix uniform prices. Once more whatever fixation occurs is subsequent to the individual member's price lists which may vary. Both manufacturer and dealer are in competition for the consumer trade. If one undersells the other, if both undersell each other, there is chaos. Section 14, taken from the Steel Code, provides for an agreement between a member (whose list price may differ from all other manufacturers) and his dealers that they will not undersell the member's then effective list prices. If the price list of the member from whom they buy is lower than his competing manufacturer's, these dealers may undersell all other dealers and all other manufacturers.

11. Then there is a provision for resale price maintenance on branded goods which is permissive only, and once more relates to an individual, not a uniform price.

"None of this authorizes or contemplates price fixing. Price fixing can be read into Article X only by violating one of the soundest maxims of law, that law violation will not be presumed. It is curious the petitioners cannot see that only the minimum price provisions of Article X protect them from a war of elimination by a reduction of selling prices against the fixed wage cost level to the point where survivorship would depend upon the ultimate dollar of fin-

arcial resources. Article X plus allocation is in fact the highest degree of protection which could be given the smaller units of this industry. It completely negatives any possibility of monopoly.

"One misstatement of fact out of many presented under this Heading deserves particular attention because the Consumers' Advisory Board apparently got the same erroneous impression from some source to cause that body to disregard an important part of the proponents' economic argument and make an incorrect finding of fact. The petition states, page 2, 'It should be remembered that petitioners only make wood cased lead pencils whereas their competitors, the 'Big Four', make mechanical pencils, etc.' Out of all the members of the Industry but two make mechanical pencils, the American and Eagle Companies. The petition not only ignores five manufacturers outside Tennessee who make neither mechanical pencils nor fountain pens nor any other products but lead pencils, but in order to connect the 'Big Four' as a combination 'bogey man', it misstates the facts with reference to two of them."

On January 12, 1935, General C. C. Gilbert, Administration Member on the Code Authority, wrote to Deputy Schurz, stating that on a personal visit to plants in Lewisburg and Shelbyville, Tennessee, he had found that all four plants were complying strictly with the labor provisions of the Code. (*) He then made the following observation:

" In this connection let me say, however, that I am greatly concerned about the status of the Pencil Industry. I appeared at a Public Hearing in Washington and stated that unless NRA permitted a minimum sales price that in my opinion there would be a price war which mean ruin to the Industry. Such a prediction has come true and is now in full operation.

"For instance, the commonly used pencil which retails at 5¢ sold to the dealers when the Code went into effect at $3.47 a gross, and this on a rather narrow margin. Today that same pencil is being quoted at $1.60 a gross. The cheapest pencil made is the rubber insert pencil which sold at the beginning of the Code at 96¢ a gross. I saw a telegraphic quotation yesterday offering this pencil for 53¢ a gross. This means, of course, a tremendous loss on these and practically every other item which is being sold.

"The thing that concerns me most is that the public, the consumer, is still paying the same price for the pencil and the dealer or merchant is making the profit, and the manufacturer is losing his investment. To me it is simply a matter of time when the 'survival of the fittest' will be in business. Hard feeling is being engendered into the Industry through the slashing of prices and taking away customers and I am very apprehensive of the outcome of the situation."

Shortly after the public hearing, on June 19, 1934, Mr. A. B. Wallace (a Class B manufacturer) wired to the Institute as follows: (**)

(*) See Deputy's File - Dr. Schurz' Folder
(**) See Deputy's Files - Trade Practice Folder

"We have lost so much business to the chiselling of Musgrave and pencils manufactured by Musgrave's for pencil distributors that unless minimum prices can be approved promptly as Mr. Dahlberg assured you and me at hearing June 5th, we will have to meet this competition immediately. This will mean breaking down of the industry price schedule and will involve the necessity of our withdrawal from any and all articles of the Wood Cased Lead Pencil Code. The situation has reached a point where we can stand it no longer. Will you advise promptly if we are going to have relief and cooperation from NRA."

The files also contain a telegram from the President of the National Stationers' Association (representing 2,500 stationers) in favor of the proposed minimum price schedule as a necessary protection for the small dealer. (*)

The file contains certain statements in support of the proposals of the code proponents. A letter from the President of the National School Supply and Equipment Association presents a resolution backed by their Eastern members (representing 90% of the distributors). (**) These distributors approved in substance the code submitted by the Lead Pencil Institute, Inc., with particular reference to those provisions of a properly protected resale price schedule, together with careful planning of marketing channels so as to protect the distributors. They specifically recommend, however, (1) that resale price schedules carry not less than 40% profit in the upper bracket and 10% in the lower, and (2) that where commercial and school lines are of a similar type or style, plans be made to develop a distant school line to be sold only through legitimate school supply distributors.

(*) See Deputy's Files
(**) See Deputy's File - Volume B-1

Certain objections were made against the proposals of the code proponents. The Consumers' Advisory Board of the N.R.A., in a memorandum from S. F. Heinritz to Deputy Paddock on January 26, 1934, recommended deletion of Article X -"Marketing Terms" in its entirety and stated: (*)

> "It is frankly a price-fixing agreement involving virtually every device for the elimination of competitive distribution *****. The effect of such a plan would be to freeze the present system of distribution, eliminating competition from marketing, dictating the policy and action of dealers outside the scope of the code, and denying buyers of any opportunity to share in possible economies of manufacture and distribution ***. The arguments advanced in justification of this schedule seem to us to be specious. The fixed unit resale price - based upon traditional usage and natural divisions of fractional currency - actually provide a considerable variety of price within the popular price range; 1 cent; 2 cents; 3 for 5 cents; 3 cents, 2 for 5 cents; 3 for 10 cents and 5 cents. Furthermore, this natural price level does not apply to the very large volume of consumer sales which are actually affected in dozen lots, and to the requirements of large industrial users which frequently represent quantities far in excess of normal dealer or distributor transactions. The competition on quality basis with fixed prices would tend to place the business largely with the large, extensively advertised lines at the expense of the lesser producers who might otherwise logically and legitimately compete with a price appeal to offset the publicity advantages. The 'outside competition' from mechanical pencils is largely a case of competitive products manufactured by the same companies which make wood-cased lead pencils, and is consequently merely a matter of internal readjustment within these companies."

In an earlier memorandum, dated December 14, 1933, Mr. Haddock of the Consumers' Advisory Board had recommended deletion of the following provisions of the proposed code, among others: Article VII, Section 9 (objectionable resale price maintenance); Schedule B, Section 4 (amounts to price fixing); Sections 10, 11, 12 and 13 (Strictly price fixing and should be deleted); Sections 14 and 15 (relate to resale price maintenance and should be deleted); Sections 18, 22 and 23 (these provisions aim directly or indirectly at control of prices and should be deleted). (**)

In a code summary of the Consumers' Advisory Board, dated March 26, 1935, the following was stated: (***)

(*) See Deputy's Files - Volume B-2, (pages 224-226)
(**) See Deputy's File - Volume B-2, page 156.
(***) See Consumers' Advisory Board Files - Folder B.

"(1) A proposed minimum price schedule was submitted to the Administrator for approval on April 27, 1934. The Consumers' Advisory Board (May 10 and 17) recommended a public hearing for the purpose of adducing evidence whereby the fairness of the schedule might be determined and again voiced objection to Article X, Marketing Terms, including Section 4 under which the minimum price schedule was submitted. A hearing was held on June 5, 1934.

"(2) The Consumers' Advisory Board reported on the minimum price schedule on June 14, 1934. It was pointed out that, according to the evidence submitted at the hearing, the profits of the industry (according to a composite operating schedule covering 88% of the output of the industry) ranged from 6.59% on invested capital in 1929 to 2.06% loss in 1932. Questionable items were felt to have been included as cost, however. The Board also disagreed with the contention of the Code Authority that approval of the code implied permission to use the schedule compiled by the Code Authority irrespective of approval or disapproval of the Administrator. The refusal of the industry to submit detailed cost figures to the Consumers' Advisory Board was pointed out as being contrary to the offer made by the executive secretary at the public hearing.

'The conclusion reached was that no emergency requiring minimum price fixing existed. The Board reiterated its objection to the whole of Article X and recommended that it be replaced by Section 1 (a) of Office Memorandum 228 as a means of forestalling a possible price war.

"(3) On September 27, 1934, in reply to a request by the Code Authority for approval of a minimum price for a single class of pencils (5¢. yellow, red eraser, gilt top) in order to validate the simplified practice procedure, the Consumers' Advisory Board recommended disapproval. On November 6, the entire minimum price schedule was disapproved by N.R.A.

"Note: The minimum price schedule was made up to dovetail with the simplified practice recommendation formulated by the Lead Pencil Institute. Prices were set for all classes and types of pencils, the classes set up on the basis of color, shape, attachments, etc., but without essential regard to quality. Retail prices were fixed as well as the scale of discounts based upon a classification of customers."

A protest is contained in a letter from H. L. Woosley, President of the National Pencil Company, Shelbyville, Tennessee. (*) This company is a newcomer in this industry, having started operations only a few months prior to the date of this letter, September 15, 1933. The letter claims that the Institute would like to eliminate this company and quotes statements to that effect made by Institute officials. Therefore, among other things, Mr. Woosley objects to any code

(*) See Deputy's Files - Volume A, pages 181-183.

provisions requiring reporting of confidential information to a committee of the Institute, fixing terms, providing resale price maintenance, and fixing minimum prices, for this newcomer's only method of competition with older, well-advertised brands, is through price competition.

A further protest is contained in a letter from Mr. Channing Sweitzer of the National Retail Dry Goods Association (representing 4,000 department, dry-goods and specialty stores), which letter contains the following objections, among others: Protest No. 1 - Seek elimination of Article V - "Marketing Terms", which requires the observance of the restrictions imposed by Schedule B. States that it is the enabling provision under which Schedule B sets up price maintenance and resale control machinery. Tends to create a monopolistic practice with the evils of price fixing. Protest No. 2. - Article VII, Sections 5, 6, and 7, while in themselves may not be price fixing, they contribute to the basic structure for the resale price maintenance found in Schedule B. Section 7 permits the Code Authority to cancel a member's filed price and require the filing of a new price list which will conform to those filed by other manufacturers, giving a fine opportunity for the fixing of uniform prices, particularly where price information clears through the same central agency. Protest No. 4. - Seek elimination of that part of Article VIII, Section 9, reading as follows: "nor continue to sell to dealers or other purchasers who resell below the fixed minima or agreed resale prices." This association has for years joined in battle against price fixing and resale price maintenance.

Uniform resale prices are inequitable to retailers selling, they do, under varying conditions; are an unfair attempt by the manufacturer to control the retailer's profit; and tend to increase consumer prices because it establishes a price average high enough to protect efficient and inefficient manufacturers alike. Protest No. 9 - Object to most of Schedule B - "Marketing Terms", because it proposes price fixing, which is against the interest of the retail trade and contrary to public policy. Specific objection is made to the following sections; 4 (minimum prices set by Code Authority), 5 (exchange of price list information - tends toward uniform price lists), 6 (makes it mandatory for those not using price lists to file such lists and revisions), 7 (which restricts sales to price lists established), 9 (standardizes discounts by distributors), 14 (establishing resale prices), 15 (providing for resale price maintenance contracts), 16 (setting up limitation of distribution), and 19, 20, 21 (which link prices to industry standards). Section 2 should be changed from "F.O.B. factory" to "F.O.B. city or origin" in keeping with present custom. Section 18, requiring that orders for less than $15 worth of pencils must be billed at less than the maximum discount, will be oppressive to many small dealers to whom $15 is a large order - and even larger purchasers would have to pay a penalty for fill-in orders, for which penalty there is no justification. Because of the many objectionable features of Schedule B, the association feels it should be deleted, or rewritten in such fashion as to omit the price fixing features. (*)

In a brief (mentioned above) on behalf of two of the code opponents

(*) See Deputy's Files - Volume B-1, page 26 et seq.

who were petitioning for certain amendments to the code, it was stated:(*)

"Your petitioners, as small enterprises, respectfully ask for your protection against oppression from the 'Big Four' and ask that the price fixing power be taken away from the 'Big Four' who control the Code Authority, by eliminating Article X in its entirety, in order to curb monopolistic tendencies already manifested in the price fixing activities of the present Code Authority for this industry.

"Your petitioners respectfully contend that it is the deliberate policy of the present Code Authority under power given them to fix 'fair minimum prices' as authorized by Section 4 of Article X, to so manipulate prices as to oppress and eliminate Petitioners as competitors. To substantiate this contention the Petitioners would like to call your attention to specific actions of the Code Authority in fixing prices in total disregard to cost of production or any other factor but with an eye simply toward hurting the business of Petitioners and at the same time being to the profit of the 'Big Four'.

"For instance, the price of pencil Class #2, Type 4, as set forth in Bulletin No. 4-34, issued by the Code Authority, is fixed at $2.16 per gross. This is a pencil known to the trade as a school pencil, and in unpainted and without an eraser of any kind, and is, generally speaking, a cheap pencil, insofar as cost of production is concerned. Yet it is a type of pencil upon which the 'Big Four' does a large business in that the 'Big Four' have for a long time enjoyed and still enjoy certain avenues of approach to school boards, and school districts that enable them to practically secure all of the school trade. It is, therefore, our contention that since the 'Big Four' already has practically all of the school business, they have fixed an unreasonably high profit on this school pencil at the expense of the school children of America. On the other hand, the present Code Authority has seen fit to exercise or attempt to exercise its arbitrary price fixing power, as embodied in Section 4 of Article X, on the three of four types of pencils on which Petitioners do practically all of their business, so as to make the profit unreasonably small, on which the Petitioners must depend for a living.

"As an instance, pencil Class 1, Type 3, of Bulletin 4-34, issued by the Code Authority, is fixed at only $1.68 per gross, although this pencil is painted in fancy colors, has a metal tip, with an eraser, and whose cost of production is considerably more than the school pencil just cited, but whose price the Code Authority has fixed at $2.15 per gross.

"Or take, for example, pencil Class 1, Type 5A of Bulletin 4-34, issued by the Code Authority. Petitioners do most of their business on this pencil, and it is a good pencil with

(*) See Deputy's Files - Compliance Folder)

with a most attractive fancy finish, with a gilt tip and a red eraser, yet the price is still fixed at 12 cents per gross lower than the very inferior school pencil which is without even a tip or eraser and is even unpainted.

"Or take, for example, pencil Class 1, Type 5B, which the Code Authority says must sell at $1.98 per gross. This pencil is painted and has a gilt tip and a red eraser and costs considerably more to make than it does the so-called school pencil above referred to, yet the Code Authority has decreed that we must get 18¢ per gross less for our pencil than it costs us much more to make, than they get for their school pencil, which is unpainted and has no tip or eraser and generally is inferior to our pencil Class 1, Type 5B, which the Code Authority says must be sold for $1.98 per gross."

After the Darrow Review Board made certain findings to the effect that this code was oppressive of small enterprises, Colonel Gaskill of the Code Authority wrote a letter to General Johnson in reply to the charges, stating in part as follows: (*)

"The "The 5th finding objects to the provision permitting the Code Authority to set the minimum prices on pencils retailing at 5¢ each or less, and challenges the impartiality of the Code Authority. It overlooks the fact that the Administrator's approval is required. The Code Authority has seven members (4 large,1 medium and 2 small) and 5 votes are required to pass any action. This is satisfactory to five small members.

"The 6th finding objects to the power of the Code Authority to regulate the sale of obsolete, imperfect and damaged goods, due to partiality of Code Authority. Again, five small members have no objection and any one has the right of appeal to the Administrator.

"The complaint was registered by two small companies in Tennessee. The Board ignored the fact that five other small concerns are perfectly satisfied."

A letter from the Mail Order Association of America, dated November 6, 1933, objected among others to Article X, Section 4 ("minimum price fixing contrary to N.R.A. policy"), and Section 14 ("attempts to fix prices through to the consumer".) (**)

A letter from R. R. Yates (Bank Supplies), Joliet, Illinois, registers objection to Article X, Section 14, on the ground that i is unfair as to imprints, which do not have advertising cost to hold up the price, as do the standard brands.(***)

(*) See Deputy's Files
(**) See Deputy's Files - Volume B-2
(***) See Deputy's Files

The petition for code amendment, referred to above, also contained a protest against Article X, Section 21 of the code (which provided that prices to dealers for dealer imprints should not be less than the prices to dealers for equivalent types of standard brand pencils), on the ground that the provision "takes away the right of price appeal from the small producer and restricts his business unnecessarily in favor of the large producer."

Further protest is contained in a letter from Frank H. Beck of the Empire Pencil Company. (*) Mr. Beck states that his is a small firm, employing 36 people, but has been in business for 32 years; that his firm pays the best wages in the industry and is the only one to sign the P.R.A. at this date, September 7, 1933. Mr. Beck objects to the "resale policy" of the proposed code:

> ....."It is impossible for me with a small plant to compete with manufacturers who have been in business for 75 years or more and who have been continuously advertising their brands and have brought them before the public. As for instance - the four leading manufacturers have lead pencils which sell at 5¢ retail and which they are selling at the present time at $3.75 per gross. These lead pencils are selling at this price more on account of the fact that their brands are highly advertising, such as Mongol, Mikado, Velvet and Ticonderoga, whereas I have no such pencil to offer.
>
> "We have always sold 2 for 5¢ and 3 for 5¢ pencils; we also have an excellent number at 3 for 10¢. On page 93 of the proposed code is listed the only pencil which we sell at 5¢. We call it our #527, which at the present time we sell at $3.40 per gross; it is a pencil and protector. The Pencil Institute expects to increase the price of this pencil to $9.00 per gross. At that price it would immediately eliminate this number from our list. At the present time we sell about 6,000 or 7,000 gross of this pencil per year and it is an excellent 5¢ item. The price on this item should not be increased as that is not at all necessary as the profit is large enough for the manufacturer and for the retailer at the $3.40 price. If the price were increased to $9.00 per gross, I would be willing to pay any salesman a commission of $5.00 per gross to sell these pencils for us; however, I know the public would not buy them at 10¢ each. At the $3.40 price it is an excellent article at a fair price; there is practically no market for us for 10¢ pencils.
>
> "On page 5 of the letter from the Lead Pencil Institute to the President they intimate that when a person does not buy one of the leading brands at 5¢ each they get cheated. I can convince any fair-minded person that our 2 for 5¢ pencils are equal to their 5¢ pencils in every respect. I am sure that when a customer buys our 2 for 5¢ pencil they

(*) See Deputy's Files - Protests Folder.

are getting good value and are not being cheated. As a manufacturer of lead pencils I want to state that it does not cost much more to make a high price pencil. The main reason in getting a higher price is getting the cost of advertising and enormous salaries to executives. This cost I am able to save as my product is put up in simple fashion without any frills, or expensive advertising, therefore, I sincerely believe that the part of the proposed code which relates to price fixing should be eliminated and that each and every manufacturer should sell his own product for his own advantage and to the advantage of the public at large. If the manufacturers desire to agree as to selling price, which I understand they do, this should be done outside of the proposed code. The four large pencil manufacturers during the war increased their plants 100% which should never have been done. It is easy to see that in normal times they cannot keep their entire plants going, which adds to the general expense of the cost of manufacturing their pencils."

Also see a letter dated April 19, from Frank A. West, a jobber quoted on Page A-67, under the heading "General Distribution."

On June 25, 1934, the law firm of Cooper and Cooper, Shelbyville, Tennessee, wrote a letter in behalf of the Musgrave Pencil Company and the Empire Pencil Company, from which the following is quoted: (*)

"The protestants have heretofore pointed out in public hearings for this industry that they are without representation on the present Code Authority, and that the present Code Authority has already lowered the price unreasonably low on products on which the protestants do the major portion of their business; while at the same time raising the prices unnecessarily and unjustifiably on certain products upon which portestants do little or no business.

"For example, the Big Four do a large business on pencil Class II, Type 4, which is unpainted and without a tip or eraser, yet the price has been fixed at $2.16 per gross, whereas on Pencil Class I, Type 3, on which the complainants do a large business the price has been fixed at $1.68 per gross although it costs more to paint this pencil and more to put a tip on it and more to place an eraser in the tip. The cost of lead in both pencils is practically the same, the lead in the school pencil costing only two cents per gross more. In other words, it was brought out in the testimony, that it cost more to make the pencil which the code says must sell for $1.68 per gross, than it does to make the pencil whose price the code fixes at $2.16 per gross.

(*) See Deputy's Files -- Trade Practice Folder

"Other instances of discrimination are shown in pencils Class 1, Type 5-A, which costs a great deal more to make than the so-called school pencil, yet the Code fixes this price at $2.04 per gross. The same is true of Pencil Class 1, Type 5-B, whose price the code fixes at $1.98 per gross.

"The complainants sell less than one per cent of the untipped pencils such as the School Pencil described above."

On June 4, 1934, S. H. Kress & Company, New York, New York (5-10-25 cent store chain) sent a letter stating in part: (*)

"Disregarding for the moment all the evils attendant upon price fixing, consider the position of the small members of this industry. The rigid discount sale which has been set up will penalize these members whose smaller variety means smaller orders. The position of the small manufacturer will be made further untenable by the combination of price fixing with the standardization provisions already embodied in the code. This will force him to produce and sell, at the same or higher price, pencils identical in appearance, with the highly advertised items of the 'Big Four'. In short, the approval of these suspended sections will mean revoking the right of the 'little fellow' to do business. (The suspended sections referred to are Sections 8 through 15, Article X of the Code.)

"In this connection it should be noted that the industry (Big Four) has directed its efforts chiefly against pencils in the lowest price brackets. At first they attempted to eliminate entirely the penny pencil, but finding that too dangerous, they have concentrated all their efforts in making the lower priced pencils so unattractive as to drive the consumer to purchase the higher priced pencils. It should be remembered that school children purchase the greatest part of the volume of lower priced pencils and, therefore, that it is by exploitation of these that this group of manufacturers hope to swell their profits.

"The 'Big Four' are still seeking to strengthen their monopoly and secure guaranteed profits. If the NRA fails to achieve its purpose, the failure can be laid at the door of such selfish and self-interested groups as the one that is pushing this code. It is our earnest opinion that this matter deserves serious attention and investigation."

However, the Frost Office Appliance Company, Worcester, Massachusetts, on April 16, 1934, wrote in part as follows: (**)

(*) See Deputy's Files - Trade Practice Folder
(**) See Deputy's Files - Trade Practice Folder

"Lead pencils have long been a loss leader in this industry and the price has been forced down to a point where it is no longer profitable, but there is a loss on every sale if sold at the prevailing prices. Because the prices have been so absurdly low, only drastic regulations could possibly put them back in the profit class."

The minimum price schedule is shown by the files to have been recommended by the Deputy for approval. However, a memo from the Review Officer to the Division Administrator, dated June 28, 1934, found the proposed Order inconsistent with policy inasmuch as there was no evidence of emergency or that the minimum price schedule was necessary to halt destructive price cutting, and because of the fact that sufficient facts had not been submitted to substantiate costs in arriving at prices. An Administrative Order disapproving the proposed schedule was then issued. (*)

Certain other provisions in the code had a part in the Institute's pricing plan. Such provisions regulated discounts of various types and prohibited practices (such as returned goods, advertising allowances, samples, etc.) which would tend to break down the contemplated price structure and minimum prices. However, these provisions are of more direct interest in connection with other topics of study and will be found discussed under other headings herein.

3. Price Differentials

Several code provisions provide price differentials affecting different types of customers. In Article X, Sections 8, 10 and 12, respectively, provide maximum terms and discounts for sales to consumers, dealers, and distributors of advertising pencils.

Section 8 provides that the quantity ordered by the consumer for one shipment shall govern the quantity discount, which is stated as a percentage off list. (The list price was contemplated in the code as the price for direct sale from the manufacturer to the consumer, and the dealer's margin was his percentage off list. Later under this topic of discussion it will be seen that the Code Authority requested approval of separate lists of minimum prices for consumers and dealers, in order to establish the differential between them which the suspended sections under consideration would have effected.)

Section 10 provided a maximum trade discount of 40% off list for sales to dealers (except in the case of one pencil type), subject to standard credit and cash discount terms. However, after January 1, 1935 dealers purchasing less than a certain specified amount during the preceding year from the manufacturer concerned, were to be allowed lower percentages from list, depending on the quantity ordered. The manufacturers were classified into three classes, A, B and C, according to their percentage of the total industry volume, and the minimum amount which the dealer was to have purchased during 1934 to obtain the 40% deduction from list was: From Class A members - $200.00 net; from Class B members -$150.00 net; and from Class C members - $100.00 net.

(*) See Review Division Files.

Section 12 provided the maximum discounts for blank pencils for shipment at one time to recognized distributors of advertising pencils. (The provision also provided that blank pencils for imprinting should not be sold to the general trade, but only to recognized distributors whose names should be filed with the Code Authority. Section 13 also suspended, provided that the Code Authority should determine and arbitrate all questions as to the status of purchasers or prospective purchasers, subject to a right of appeal to the Administrator).

The file contains a letter from James C. Bangs, Wholesale Stationer, Pocatello, Idaho, requesting that the suspended provisions of the code be permanently suspended. Mr. Bangs says that the Institute intends through these provisions to retain direct sales to large industrial consumers, rather than utilizing the legitimate wholesale channels. Attached to this letter was a letter from Mr. Bangs to Colonel Gaskill of the Institute, in which Mr. Bangs stated that the manufacturers are attempting monopoly, without regard for any interest other than their own - that the suspended provisions would have enabled the manufacturers to control quantity sales and to dominate prices, making no provision for the distributor's legitimate cost of doing business.(*)

The file also contains a letter from N. D. Dobson, Dobson Evans Company (Wholesale School Supplies), Columbus, Ohio. This letter states that they have received a letter from one of the large pencil manufacturers urging them to petition that the stay on certain code provisions be lifted. However, Mr. Dobson requests that the suspension be made permanent, stating that Sections 14 and 15, particularly, are a threat to the business of the distributor, making no distinction between the distributor and the small local dealer. He further states that his firm has for years sold pencils at wholesale prices direct to the schools; that the dealer in a small town buys in small quantities, while his firm buys in large quantities; that the set-up of the manufacturers will put a drastic increase in prices which boards of education will have to pay. (**)

(Note: Mr. Bangs and Mr. Dobson evidently use the term "distributor" as meaning "wholesaler" in the ordinary sense of the word, rather than giving the term "distributor" the special meaning which Colonel Gaskill stated it had acquired in the industry by custom. See this statement under the topic "Customer Classification".)

The files also contain a letter from Harry Gertz, B. Gertz, Inc., (Department store) Jamaica, Long Island, requesting that the stay be made permanent. (***)

On the other hand, John M. Cooper, Foote and Davis Company, Atlanta, Georgia, wrote to request that the stay be lifted to "correct deplorable conditions". (****)

(*) See Deputy's Files
(**) See Deputy's Files
(***) See Deputy's Files
(****) See Deputy's Files

Also see "General Distribution" under Part II for excerpts from brief filed by Cooper and Cooper in behalf of two small manufacturers, the Musgrave and Empire Pencil Companies, petitioning for amendment to the code. Among other objections, this brief states that Section 10 takes away every vestige of legitimate price appeal from the small producer. (*)

The answer of the Code Authority to this brief, reported under the same heading, will also be of interest. (**)

The Wholesale Stationers' Association of the U.S.A. filed a brief in favor of the code proposed at the hearing, with the exception of Section 12 of Schedule B (which later became Article X, Section 10). This association consists of about 100 leading wholesale distributors of lead pencils. This association takes the opposite view from the petition of Cooper and Cooper, and feels that the minimum purchase requirements for maximum discounts should be much higher to protect the wholesaler and to prevent the manufacturer handling thousands of small factory accounts, which they state is uneconomic in principle. (For excerpts from this brief, see "Quantity Discounts", under Part II; also see Deputy's files - Volume B-1, page 79).

At the public hearing on November 6, 1933, Mr. Hall (representing several small manufacturers who opposed the Code) stated in opposition to Article X, Section 10, that his group wishes to take any size order from a good dealer; that many dealers would not buy $100 worth a year from them; that they take a sample order and see how the pencil holds up, so that it takes some time to develop their business. Mr. Hall further stated that the restrictions of Section 10 would seriously prevent their building up a business, as dealers rarely purchase $100 worth on a new account; that to get their business they must give the 40% dealer's discount. (***) These three sections were among those suspended by the Administrative Order approving the code.

Section 11 of Article X, provides that the Code Authority with the approval of the Administrator, may establish an additional scale of cumulative discounts based on the dealer's or distributors entire annual purchase of industry products from all the members of the industry combined. This section was also suspended at the time the code was approved.

The files contain a letter, dated March 13, 1934, from D. H. Sparks, A. C. McClurg & Company, Troy, New York (a large wholesale stationer with an annual volume of $75,000, serving more than 10,000 small retail dealer accounts). (****)

(*) See Deputy's Files - Compliance Folder
(**) See Deputy's Files - Folder 2
(***) See transcript of hearing, pages 87-111
(****) See Deputy's Files.

Mr. Sparks requests the removal of the stay on Section 11 of Article X, to permit a differential to large volume buyers. He stated that price lists then received from factories did not permit wholesaler and retailer to make a living margin. at the same time leaving the consumer price unchanged. He includes the following table:

	Previous Cost	Previous Selling Price
Penny Pencil	$ .81 per gross	$ 1.08 per gross
3 for 5¢ pencil	1.31½ " "	1.70 " "
2 for 5¢ pencil	1.49 " "	2.10 " "

	Lowest Price Under Code	Current Selling Price
Penny Pencil	$ .96 per gross	?
3 for 5¢ pencil	1.78 " "	?
2 for 5¢ pencil	1.98 " "	?

Mr. Sparks further states that, in effect, Article X, Section 11 of the Code seems to have placed manufacturers in a position where they cannot name prices or discount arrangements to the legitimate and long established wholesale trade. "It does not seem fair that dealers buying as little as $3 or $4 a week can buy from the manufacturer at the same price as a large distributor, whose sales are largely to dealers who must compete with such direct selling dealers."

Article X, Section 4 of the code, which provided for schedules of minimum prices to be filed to be ascertained by the Code Authority, subject to the approval of the Administrator, was never approved, in spite of strong effort on the part of the Code Authority. However, the proposal of the Code Authority consisted of two schedules of minimum prices - one for sales to dealers and another for sales to consumers - so the attempt was to provide a price differential through the use of this provision.

The Code Authority submitted a brief at the public hearing held June 5, 1934, to consider their proposed minimum price schedules.(*) The brief again contains their contention that consumer prices of pencils are established by long usage in terms of fractional currency, such as 1 cent, 5 cents, etc., and that the retailer and wholesaler must get their compensation for distribution activities from a percentage on the consumer's price per gross. Then the brief stated:

> "There are types of pencils which do not pass through this characteristic distribution channel, and are not subject to the same automatic control of prices to the trade by prices made by the trade to the consumer. These are the pencils which go to certain large consumer-buyers which are characteristically sold in considerable quantity. While these pencils are not directly subject to this control, they

(*) See Deputy's Files - Folder 20

are indirectly controlled by it and must, in fact, be controlled with reference to the price scale which applies to pencils passing in small quantities through the retail channel to the consumer."

The brief contains a further section, entitled: "Necessity for Consumer Minimum as well as Dealer Minimum Price List." It states that Article VII, Section 8, not only does not prevent a different price upon the same quality and quantity of goods as between dealers and consumers, but recognizes that such a difference may exist, thereby establishing a basis for a different minimum price for each type, differing as to each. Also the code through Sections 8 and 10 of Article X, established different discount rates for dealers and consumers.

"If one minimum price is established with reference to dealer sales, there being no opportunity under the code for standard industry quantity discounts, it must follow that a minimum price which would afford an adequate margin to the dealer would be so low with reference to possible sales to consumers, that the industry would be forced into direct sales to consumers by competitive pressure. The result would be the wrecking of the distribution system, and an increased cost to the manufacturer as a consequence. If, on the other hand, a single minimum price list is stated at a level which affords adequate protection to the manufacturer with reference to consumer sales, it practically forces sales to consumers and dealers upon the same terms which would once more wreck the distribution system. The only answer to this dilemma is the approval of a minimum price schedule applicable to dealers, and a different minimum price schedule for consumers, with a bracket between the two which is adequate but no more than adequate to the dealer's minimum requirements."

(The brief previously pointed out that the suspended sections of Article X concerning discounts to dealers and consumers, would have made it possible to effect such difference in price between these classes of customers.) The brief further states:

"Unless this interpretation is approved, the only practicable course of the Code Authority, other than a rejection of the code in its entirety, is to endeavor to establish, by industry agreement, minimum prices for dealer transactions and minimum prices for consumer transactions, which will be, of course, an illicit arrangement; because without this bracket, it is utterly impossible that the complicated system of distribution which has grown up around this industry can be carried through.

"When a stationery dealer sells pencils at the established minimum consumer prices, he yields an average gross profit on his selling prices of just about 10%. It is a matter of

record, based upon accurate studies, that the stationer's cost of doing business is, on the average, 30% of his selling prices, or higher. It is at once clear that if the stationer were to do any large part of his business on the limited gross profit of 10%, which accrues to him from the sale of pencils from the established minimum consumer prices, he would quickly be headed for bankruptcy. No fair-minded buyer for any corporation, no matter how large, would expect a merchant to sell him merchandise on less than a 10% gross margin of profit; at the same time, the establishment of the fair minimum prices is a considerable protection to such corporations in buying pencils on a favorable basis."

The files contain a number of pieces of correspondence urging approval of the minimum price schedule as proposed by the Code Authority. (*) Charles Wadsworth, Director of Sales and Advertising, American Lead Pencil Company, in a memorandum to J.K. Reckford of the same company, urged immediate approval of the price schedule, stating that customers, big and little, who bought pencils at prices which appeared to be stabilized by the code were wondering what was going to happen to them, and that others were not going to buy until the atmosphere was clear- that the nervousness and panic of smaller manufacturers was even more acute, so that unless action was taken they wouldn't dare stay on the "band wagon." "***nothing but chaos and distress will result from the absence of a stabilized structure."

The Joseph Dixon Crucible Company, Jersey City, New Jersey, stated that minimum prices to consumers should be higher than minimum prices to dealers, in order that manufacturers will not come directly in competition with their dealers in direct consumer sales. The letter states that the writer understands that the term "consumer" as used in this connection applies to large orders and contracts only and is not intended to regulate dealer's prices to small buyers.

The Mohican Pencil Company, Philadelphia, Pennsylvania states that it thinks price lists for both dealer and consumer are necessary, but will not agree to them unless standards are approved.

The Wholesale Stationers Association, Buffalo, New York, writes that it feels the price schedule to be necessary for the protection of the small wholesaler.

Other letters and telegrams in support of the proposed minimum price schedules were received from the following companies: Richard Best Pencil Company, New York, New York, Blaisdell Pencil Company, Philadelphia, Pennsylvania, Eagle Pencil Company, New York, New York, Eberhard Faber Pencil Company, Brooklyn, New York, General Pencil Company, Jersey City, New Jersey, National Pencil Company, Shelbyville, Tennessee, Red Cedar Pencil Company, Lewisburg, Tennessee, and Wallace Pencil Company, St. Louis, Missouri. (The General and Red Cedar Pencil Companies seem to have changed their position,, for on October 21, 1933, they joined five other small manufacturers - including the four so-called "importers discussed previously - in proposing a code of their own, which code omitted many of the provisions contained in the code submitted by the Lead Pencil Institute, Inc. This proposed

(*) See General Files - Folder 333 Price Fixing

code did not contain a clause similar to Article X, Section 4, nor sections similar to Article X, Sections 9, 10 and 13, providing different discounts for sales to different classes of customers. (*)

Two other provisions of the code which were designed to establish price differentials were Article VII, Section 1 and Article X, Section 14. These provisions were both suspended by the Administrative Order approving the code. For detailed treatment of these provisions see "Restrictions on Sales to Certain Classes of Outlets" under Part II. At this point, however, these provisions are mentioned due to the fact that they provided an unfavorable price differential for importers and other dealers who failed to comply with certain specifications. As will be seen later, they were written for the purpose of accomplishing other objectives through the penalty of a price differential, and were subject to strong opposition by those adversely affected, who stated the provisions established a boycott. (Article X, Section 14 has already been dealt with in another connection under the subject "Resale Price Maintenance.")

4. Quantity Discounts

Article X of the code contained several provisions which concern the subject of quantity discounts. Some of these provisions establish quantity discounts as such, while other provisions in effect provide discounts based upon quantity. As will be recalled, the letter of transmittal (quoted on pages A-99-104) contained the following statement:

> "The quantity discount has been discarded because of its inevitable tendency to become preferential as well as to lead to over-buying and distress selling."

That this statement was inaccurate, unless subjected to considerable qualification, is clear from a study of Article X. Below are listed, in summary form, the provisions which provided for quantity discounts in one form or another (although except where otherwise noted, the provisions were suspended by the Order approving the code):

Section 1. Defined list price and established the base from which quantity discounts were to be deducted. (Active provision.)

Section 2. Provided free delivery for shipments above a certain quantity, by weight. (Active provision.)

Section 7. Permitted an advance dating privilege on single shipments above a certain quantity, by value, graduated by class of manufacturer. (Active provision.)

Section 8. Established graduated quantity discounts (as a percentage of list price) for sales to the consumer of standard lines and special imprints, not for advertising.

(*) See Deputy's Files - Volume A, page 231 et seq.

Section 9. Established minimum terms, graduated according to quantity, for sales of pencils specially imprinted for advertising purposes.

Section 10. Provided lower than standard trade discounts, graduated according to quantity, for sales of standard lines and special imprints, not for advertising, to dealers who annually purchased less than special amounts.

Section 11. Provided for later establishment by code authority of graduated cumulative discounts based upon dealer's or distributor's entire annual purchases of industry products.

Section 12. Provided graduated quantity discounts (as a percentage off list price) to be allowed distributors in sales of advertising pencils.

Section 18. Provided less than the standard trade discount on single orders for less than a specified quantity, by value. (Active provision.)

These provisions are discussed individually in more detail below, but the above list and brief comment should give a clear picture of the part contemplated for the quantity factors, in spite of statement by the code proponents to the contrary.

Section 1 was merely a definition and requires no further comment.

As for Section 2, see "Restrictions on Size or Manner of Making Shipments," pages 148 and 149, for protest against this provision as an unfair use of the quantity discount.

Sections 8, 10 and 12 have already received considerable consideration under the subject "Price Differentials". Being of principal interest under that topic of discussion, they are dealt with in more detail at that point.

The Secretary of the Wholesale Stationers' Association of the U.S.A. filed a brief with the N.R.A., which brief favored the code proposed by the Institute with the exception of Section 12 of Schedule B (Article X, Section 10 in the approved code). (*) It is stated that this association has in its membership about 100 of the leading wholesale distributors of lead pencils.

This brief states that these distributors, with warehouse and distributing facilities located in every marketing center of the country

(*) See Deputy's Files - Volume B-1, page 79.

"performing functional services of great economic advantage to the factories and primary producers of the stationery industry" are confident that any provision in a manufacturers' code which extends maximum discounts to buyers of lead pencils in quantities of $200, $150, or $100 per year (averaging about $3.80, $3.00 or $2.00 per week) according to the classification of manufacturers, is uneconomic in principle and will tend to build up thousands of small factory accounts which cannot be properly serviced or handled by the manufacturer, and which diverts from the wholesaler the type of buyer most in need of the wholsesaler's services and facilities.

These wholesalers further petition that if provisions covering maximum discounts are included in the code, that wholesalers should receive discounts in graduated amounts, granted either for large quantities or large dollar volume, consistent with the saving to the manufacturer for the quantities involved.

Attached to this brief is the following provision which this association proposes be substituted for Section 12 of Schedule B:

> "The member's lowest selling price to dealers for standard lines and special imprints not for advertising, shall be the effective list-price filed as herein provided, less the maximum trade discount of 40% off list and subject to the standard credit and cash discount terms. This standard trade discount is further subject to the provisions of Paragraph 14 in Section B.
>
> "This maximum discount will apply only when dealer's purchases of industry products over 12 months period are $500 net, for Class A manufacturers, $375 net, for Class B manufacturers, and $250 net for Class C manufacturers. To dealers not buying this quantity during the 12 months period, members shall sell at not more than the following quantity discounts:
>
> "1 to 4 gross, assorted, 20% off list
> "5 gross and over, assorted, 25% off list
>
> "Purchasers of Wood-Cased Lead Pencils for wholesale distribution buying and selling for their own account, in quantities over a 12 months period of $2,500 net shall be entitled to a discount of 5% in addition to the 40%.
>
> "Purchasers of lead pencils for wholesale distribution in quantities over a 12 months period of $10,000 net or more shall be entitled to a discount of 10% in addition to the 40%."

Section 11, which has likewise been discussed previously, provided that cumulative quantity discounts based on a dealer's annual business with the industry might be later established. However, this provision was also suspended at the time the code was approved. In a brief from the Code Authority to N.R.A., it was stated, among other things, that a cumulative quantity discount rate might be established which would allow small manufacturers to give the same discount on small quantities as the large manufacturers could quote to certain

large buyers. (*)

Section 9 established the schedule of quantity discounts for pencils specially imprinted for advertising purposes - a particular type of pencil not handled through the usual distribution channel. This provision likewise was suspended at the time the code was approved. The files contain no comment, pro or con, specifically concerning this code provision.

Section 18 provided that no manufacturer should ship to any direct factory account on an order for less than $15 net worth of pencils at the maximum (40%) discount off list - that such small quantities should be billed at 25% off list. Detailed discussion of this provision will be found later in Part II under the heading "Restrictions on the Size or Manner of Making Shipments," as its effect as such a restriction is its principal point of interest. It will be seen that this provision was a point of controversy between the Institute and certain small manufacturers.

Certain correspondence from the Code Authority and others was concerned with Executive Order 6767 and Administrative Order X-48, from which exemption for this industry was requested. Inasmuch as the theory behind these Orders was the government's position as a quantity buyer, these letters are inserted at this point. They concern a problem created by authority outside the code, but the information contained in these letters should be of interest in pointing out marketing problems of the industry.

The first of these letters, dated July 19, 1934, from Colonel Gaskill, Executive Secretary of the Code Authority, is as follows: (**)

> "1. The Order is not necessary to establish open competitive bidding on Government Agency proposals by this Industry. The manufacturers in this Industry who bid on these proposals are in competition among themselves because their filed price lists vary and they are in competition with dealers bidding independently, whose price quotations are not subject to any limitations arising from the manufacturers' price list and who do not operate under any open price provisions. These dealers are free to bid and do bid on these proposals on their own terms and have no difficulty in obtaining pencils with which to fill any Government Agency contract they may obtain on their own terms, inasmuch as they do not have them in stock or under prior contract.
>
> "2. The Code for this Industry does not contain any provision against not selling below cost. The operative effect of the Executive Order will be in any case in which the margin between gross cost and the best terms quoted in any list (the

(*) See Deputy's Files - Folder 2

(**) See Deputy's Files - Folder 11

Administrative Order X-48) is less than 15%, to authorize selling below cost which the Code does not control.

"3. Prior to the issue of this Order the competitive advantage in bidding on Government Agency contracts by this Industry lay with the dealer. Informed by manufacturers' price lists as to their terms, the dealer could quote under them with assurance. And did so. The Executive Order completely reverses this situation and its effect will be to eliminate the dealers in Governmental Agency contracts for the simple reason that any manufacturer can establish a price on Government business 15% below the lowest cost offered by any manufacturer to the dealer.

"4. There is no reason why a small city or borough commission should be able to buy pencils from a manufacturer cheaper than from the local stationer. It means ruin to the small local tradesmen and forces on the manufacturer the increased cost of serving a small order business in pencils which is characteristic of a large part of the field covered by the Government Agency definition in its realtion to this Industry.

"5. The claim for exemption by this Industry stands upon the same basis and is justified for the same reason as exemption already allowed the Business Furniture Manufacturing Industry through Division 1. Reference is made to the proceedings in that case. Both Industries serve the same dealer interest which is threatened quite as much in one case as in the other."

Charles Garvin, General Manager of the National Stationers Association, filed a brief endorsing the petition of the Code Authority, in which he said: (*)

"We further call your attention to the fact that Executive Order #6767 by Government Mandate eliminates from competition for Government business, the retail merchants and distributors in the commercial stationery and office outfitting trade, who have been engaged and are engaged in the selling of wood case lead pencils to all of these agencies."

"It is our understanding that this Executive Order #6767 permits anyone operating under open price plan to quote to these Government agencies prices of 15% less than their lowest filed price. Inasmuch as the lowest filed price would be the wholesale price, this automatically eliminates the dealers in the country."

"We call your attention to the fact that this business employs 11 people per firm and therefore can be well considered small business. We also call your attention to the fact that there are

(*) See Deputy's File - Folder 11

some 2000 commercial stationers in the country affected by this Order and some 10,000 to 15,000 small stationery variety stores also affected.

"We also call your attention to the fact that this Order does not establish free competitive condition, but does set up a competive condition that can only result in the elimination of all retail and distributing merchants from doing business with agencies with which they had every right to do business as free born American citizens."

L. J. Conner, Assistant to the Executive Secretary of the Code Authority, sent the following letters to Assistant Deputy Dalmas concerning Administrative Order X-48: (*)

"I am instructed by the Code Authority, to request that this Industry be exempted from Paragraph A of Administrative Order X-48 dated June 12, 1934, which reads as follows:

'(A) Quote prices and terms of sale to Governmental Agencies as favorable as those permitted to be quoted to any commercial buyer for like quantities.'

"Administrative Order X-48, as interpreted by you on July 24, 1934 to include school districts and Boards of Education, has had the effect of demoralizing trade relations in this Industry and has thrown a very large part of the school and government agencies business since this order was issued, into the hands of chiseling dealers and unscrupulous or inconsiderate merchandisers. The manufacturer who has strictly regarded his filed price list and the dealer who has been acting as his legal agent, have both been hoisted into the stratosphere by the effects of this Order. Had it come in March or April at the opening of the year's business, the effect of this Order would have wrecked the Code. The way it works is this:

"Possible bids are as follows:

1. Manufacturer A bids direct at the dealer price less applicable quantity discounts.

2. Manufacturer B bids through a dealer as agent, allowing the dealer, 10% commission.

3. A dealer may bid as an independent contractor, but must meet the dealers' prices of manufacturers A and B. Unless he takes a loss, the dealer can only do this if he has (a) pencils in stock or under contract at lower prices or (b) can get some manufacturer to sell him below the dealer price list. On this basis, the dealer as an independent contractor passes right out of the picture. Except as an agent of a manufacturer on a commission basis, X-48 washed out the dealer, it also washes out the honest dealer as an agent and the honest manufacturer with him. This is the way it works.

(*) See Deputy's Files - Folder 511

1. Manufacturer A bids direct, dealer price.
2. Manufacturer B bids through a dealer agent, 10% commission.
   Dealer X bids 5% a gross less than the lowest filed dealer price.

"The contract is awarded to dealer X who gets the pencils to fill the order very easily. He buys from a manufacturer at the dealer price and claims a 10% commission for getting the order. A part of this commission has been used in the cut price.

"When the manufacturer who furnishes the pencils is questioned by the Code Authority he denies the agency relation. Instances have occurred in which the type of dealer has secured contracts at less than the dealer's list price. The consequences is the only dealer who can do business under X-48 is one who wrongfully gets a commission from a manufacturer and cuts the dealer price list. The only manufacturer who can do business under X-48 is one who wrongfully gives a commission or rebate and sells to a dealer who does business on that basis."

"A very large part of the business covered by the Administrative Order X-48 is small volume business, which local dealers should handle from stock. They cannot buy and sell at the same price level. The tendency is to develop at the same time two kinds of dealer buying, one being at dealer lists for ordinary transactions, and the other at 10% off this list to be used on small governmental agency proposals. A very large number of these orders are too small to be treated as separate agency contracts. The two methods, the stock required by each, cannot be kept separate, with the result that the filed price list tends more and more to be ignored. The enforcement problem involved is impossible to handle.

"The whole trade relation is being thrown into confusion. Neither manufacturers nor dealers know where they stand or how to quote. Therefore, it is urgently necessary that this Industry be promptly exempted from the operation of Administrative Order X-48."

5. Discounts Other Than Quantity Discounts.

Quite a number of provisions contained in the code can be classified under this heading, for if they did not directly deal with a discount, as such, they dealt with practices whereby purchasers obtained concessions in their dealing with manufacturers. Some of the provisions provided for discounts, but some of them were "negative" provisions, i.e., prohibited practices which would have the effect of granting an additional discount or advantage to buyers, thus breaking down the minimum price structure established by other code provisions.

Article VII, Section 5 of the Code was designed to prevent price

concessions through the free giving of samples. The provision reads as follows:

> "The Code Authority shall submit recommendations for regulations concerning sampling. After the approval thereof by the Administrator, no wood-cased lead pencils shall be given away free or sold at reduced prices as an inducement to the sale of other pencils or other commodities except as provided therein."

Pursuant to this provision, the Code Authority submitted proposed sampling regulations, these regulations being approved by Administrative Order 291-9 on October 9, 1934, with a 15-day notice of opportunity to object. (*)

On the effective date of the Order, October 25, 1934, the Code Authority moved to withdraw its application for approval of these regulations, although no reason for this motion is stated or is found in the files. On November 13, 1934, Assistant Deputy Searle informed the Code Authority that until the Code Authority showed good cause for the requested cancellation of the regulation, they must remain in effect, and the files show no later action to this effect.

These sampling regulations carried into minute detail the rules concerning use of samples. Below is a digest of the approved regulations:

1. No dealers shall furnish wood cased lead pencils free of charge or at any special price concession, the distribution of free pencils being limited to manufacturers. (Comment of investigator: I do not see how a manufacturer's code with no jurisdiction over dealers can regulate them in such manner.)

2. Charges will be made for all sample plans, cards or folders supplied to customers except one. (The charges are then set forth.) Not more than 50 pencils will be provided with one flap or folder. Cards, flaps and folders must conform to the standards set up by the Code Authority and the total number of sample folders, etc. sold by each manufacturer shall be reported to the confidential agency of the Code Authority.

3. In manufacturers' free sampling by mail, not more than one full length pencil or two half length pencils may be included with each circular letter. Free samples distributed by manufacturer's salesmen or sales promotion men will be limited to one pencil to each prospective customer. When samples are required to be submitted with a bid on a proposed contract, but one sample of each type of pencil specified will be submitted. When specifications call definitely for a large quantity, that quantity may be furnished.

4. The maximum distribution of free samples by mail and by salesmen by each manufacturer during a six months period shall

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(*) See Deputy's Files - Folder 25C

not be more than 500 gross. The actual number shall be reported to the Code Authority once a month.

5. No souvenir packages will be distributed at pencil jobbers' or dealers' conventions. At school conventions such samples will be confined to school items, the contents of the samples being not more than six pieces in all, of pencils, pen holders, erasers, and the container will be a string and envelope only.

The regulations then go into detail as to what types of samples flaps and cards may be used, what type of cardboard, elastic, and whether or not there should be velvet or other cloth.

These regulations were approved by the Code Legal Adviser, but the Research and Planning Adviser recommended disapproval, pointing out, (1) that where so-called "sample" pencils are distributed contingent upon the purchase of other pencils, they are a species of "free deal" and as such, a term and condition of sale, assuming an aspect of competitive pricing. As such they should be considered as price terms and filed in accordance with Article 10 of the Code, no other restriction appearing to be economically desirable. (2) Where sample pencils and flaps are not distributed contingent upon the purchase of other merchandise they may be considered an advertising or sales promotion device, which should not be restricted more than other forms of advertising.

Article VII, Section 6 dealt with combination sales, reading as follows:

> "Whenever the sale of wood-cased lead pencils is combined by the manufacturers with the sale of other commodities, pencils shall not be given away free nor sold at reduced prices as an inducement to or reward for the sale of other commodities, or vice versa. Nor shall such special prices be quoted upon a combination offer as to represent a variation from the normal selling price of either or any commodity joined in such offer."

The only data in the files specifically dealing with this provision was a letter from Mr. Kile of the Mail Order Association of America, which objected to this attempt to prevent combination sales and to limit prices on articles other than pencils which might be included in the offer. (*)

Article VII, Section 7 dealt with "trade-ins" in the following manner:

> "No member of the industry shall buy, trade in, exchange, or receive from any dealer, distributor, or consumer any pencils made by any competing member as an inducement to the sale or listing for sale of his own products or as a part of the understood terms of sale of such products."

The files contained no comment specifically relating to this provision.

Article VII, Section 9 prohibited secret rebates in the following manner:

(*) See Deputy's Files - Volume B-2

"No member of the industry shall give, allow, or pay any secret discount, rebate, refund, or credit, no matter in what form or at what time, as a means of affecting or concealing price discriminations or of extending special preferences or privileges to particular customers."

The only information in the files dealing specifically with the subject of secret rebates in a memorandum from the code authority, dated August 14, 1934, charging violation of this provision by the National, Musgrave and Empire Pencil Companies. (This memorandum deals with several subjects, and will be found quoted under the heading "General Distribution.") (*)

Article VII, Section 11 contained a provision which considerably limited the right of contract of members of the industry, this provision reading as follows:

"No member of the industry shall accept or fill, any contract or order for wood-cased lead pencils which is not specific as to the quality and price of pencils to be furnished thereunder, and/or which continues beyond twelve months after the date when the order is placed and/or which does not specify the quantity which the manufacturer is obligated to furnish and the purchaser is obligated to accept. 'Requirements' contracts which are definite as to time but indefinite as to quantity or definite as to quantity but indefinite as to time, shall not be accepted.

The files, however, contain no information dealing specifically with this provision.

Article VII, Section 17, restricted the action of manufacturers in accepting the return of merchandise in the following terms:

"No product of this industry shall be accepted for return by any member of this industry, except such return is due to the fault of a member by reason of defects in production or packing or errors in shipment unless such member's approval has been obtained in advance of such return, and then only in exchange for other merchandise unless credit conditions justify a credit memorandum to cover. When the return of merchandise by customers for exchange is approved by the member, if the return is for other reasons than the fault of the member by reason of defects in production or packing or errors in shipment, a reconditioning charge of not less than ten (10%) per cent of the original net value of the returned goods shall be made and charge shall also be made for transportation both ways."

In its final report on this code, the Consumers' Advisory Board recommended modification of this provision to change the set 10% reconditioning charge to "a reasonable reconditioning charge." (**)

In a letter dated November 1, the National Retail Dry Goods Association sought a modification of this provision so that approved returned goods might be compensated for other merchandise or by a proper credit memorandum, which in certain cases would be more desirable. (***)

(*) Also see Deputy's Files - Folder 24

(**) See Consumers' Advisory Board Files - Folder B

(***) See Deputy's Files - Volume B-1, page 26 et seq.

In a letter dated November 1, 1933, Caron Gottlieb, wholesale stationer in New York City, protested this provision, stating that the merchant who is over-stocked should be able to return the goods if the manufacturer is willing, without paying a 10% charge; that merchants have overstocked for N.R.A. reasons.(*)

The files contain no other data specifically dealing with this provision.

Article VII, Section 18 deals with allowances for publicity in catalogs of customers, etc., in the following manner:

> "No member of the Industry shall pay or make any allowance, directly or indirectly, for space in catalogs, house organs, or any other form of publicity issued by a customer or prospective customer; provided that electros for one-color printing may be furnished free by any member to any of his or its customers for the purpose of representing the member's product in the customer's catalog or other publicity material."

The Mail Order Association of America, in the letter above referred to, objected to this provision, stating that mail order houses usually advertise under their own brand and under some circumstances are entitled to allowances for space in their catalogs.

Article VII, Section 20 may well be discussed in conjunction with Section 18. Section 20 restricted the use of cooperative advertising in the following manner:

> "No member of the Industry shall participate in or make any contribution, either in money or goods, to any cooperative newspaper advertising promoted or carried on by his or its customers. Each member shall conduct his or its advertising independent of any participation with or by his or its distributors."

The National Retail Dry Goods Association in the letter above referred to, protested against Sections 18 and 20 (as well as Section 19, which is discussed under the heading "General Distribution"), as stringent provisions against all forms of advertising allowances by manufacturers. The letter states further stat undoubtedly this practice has caused abuses, but the association does not think the sole remedy is complete prohibition. It feels that legitimate advertising promoting the sale of pencils should be permitted to the mutual advantage of manufacturer and his customer. The letter states that undoubtedly the large manufacturers with ample advertising funds want to prevent small manufacturers from cooperative advertising, but that such small business should have every chance to improve their position through legitimate cooperative advertising. The letter suggests that the provision should be modified to permit such advertising upon proof of its legitimate use.

(*) See Deputy's Files - Volume B-1, page 34

(Certain other provisions, notably Sections 19, 25 and 26 of Article VII, provide further detailed restrictions on advertising methods of manufacture. These provisions are discussed in detail under the heading "General Distribution").

Four other provisions, Sections 21, 22, 23 and 24 of Article VII, deal with allowances of various kinds. These provisions read as follows:

> "21. No member of the Industry shall make any contribution, concession, discount, rebate, or consideration of any nature, for erecting and/or maintaining or painting any outdoor advertising device or sign used or to be used by a customer. Advertising material may be furnished free for window and indoor display but no merchandise shall be given free or sold at reduced prices or loaned for display or advertising purposes.
>
> "22. No member of the Industry shall furnish any sample display equipment except the standard sample cards, flaps, or folders. No mounted sample boards of any kind shall be furnished customers for display in their sample rooms under any pretext whatever.
>
> "23. No permanent, refillable display case for wood-cased lead pencils shall be furnished to any customer for less than one ($1.00) dollar net for each gross of full capacity.
>
> "24. No prizes in money or goods shall be offered or given to trade conventions, trade outings, or outings or celebrations of customers, by members of their officials, representatives or salesmen. This provision on prizes shall not be construed to prohibit free and general distribution of articles other than pencils commonly used for advertising unless such articles are actually used as prizes.

No data specifically concerned with these four provisions is contained in the files. They are mentioned, however, to give a complete picture of the regulatory measures adopted.

Article X, Section 1 defines the term "list price" as follows:

> "The member's list prices shall be the prices at which the member shall sell one gross of his or its products to the consumer. These list prices shall be subject to the deduction of the standard quantity discounts and credit terms."

This provision is of interest in showing the base price from which net prices are calculated.

Article X, Section 2 deals with the subject of transportation charges. This provision is quoted and discussed in detail under the heading "Restrictions on the Size or Manner of Making Shipments",

and is also mentioned under the heading "Quantity Discounts".

Article X, Section 7 of the code establishes uniform standard terms of credit, reading as follows:

> "The uniform standard terms of credit shall be sixty (60) days net or two (2%) per cent for cash in ten (10) days, or two (2%) per cent, ten (10 days E.O.M.). The spring dating practice on fall shipments is hereby abolished. The terms on fall dating on spring shipments shall be as follows: Orders may be taken from dealers (not consumers), including syndicates and chain stores (for warehouse shipments only), for shipments during April, May, June and July upon invoices due and payable September 1st, subject to the standard two (2%) per cent, (ten) 10 days cash discount. Payments made after September 10 are past due. Provided, however, that this advance dating privilege shall not be allowed by any Class A member on orders for single shipments of less than $100.00 net value; or by any class B member on similar orders for less than $75.00 net value; nor by any Class C member on similar orders for less than $50.00 net value. Subsequent orders placed after April 1st for shipment before August 1st may be given the dating privilege provided the order amounts to the minimum quantities as above stated."

Sections 9 and 10 of Article X, respectively, establish the minimum terms applicable in the case of pencils specially imprinted for advertising purposes and the trade discount to dealers for standard lines and special imprints, not for advertising. (These two provisions are discussed under the heading "Quantity Discounts"; Section 10 provides generally a 40% trade discount from list price for such standard lines and imprints, with certain exceptions).

Certain provisions which are of principal interest under the heading "Restrictions on Sales to Certain Classes of Outlets", also deal with discounts other than quantity discounts, providing lower discounts than the standard 40% in certain cases. These provisions are: Article VII, Section 1 and Article X, Sections 14 and 18.

In discussing Article X generally in a brief answering a petition for amendment filed in behalf of certain small manufacturers, the code authority referred to terms and trade discounts as follows:(*)

> "Standard credit terms, freight allowances are provided. Concessions are made to small manufacturers ***. In the same way, a standard trade discount of 40% off list was established. The rate is uniform, but the member's list prices to which it applies may vary."

The National Retail Dry Goods Association, in the letter referred to above, objected specifically to Article X, Section 7 in establishing standard terms and discounts and to other provisions providing this type of standardization.

(*) See Deputy's File - Folder 2

The code as proposed originally contained a provision, Article VIII, Section 18, which was deleted before the code was approved. This provision, which is discussed under the heading "Restrictions on Sales to Certain Classes of Outlets", prohibited sales to dealers who (among other things) sold by the use of loss leaders, premiums, prizes, free deals, or commercial bribery. This proposed provision was criticized by the Mail Order Association of America, in the letter previously referred to, which said that this is an attempt to regulate merchandising methods of other industries and distributors.

The letter from Caron Gottlieb, referred to above, also criticized the proposed provision, stating that it would stop dealers from selling merchandise according to their own idea of profits; that it does'nt consider pre-code stocks bought at lower prices, which creates a hardship particularly in cases where firms are overstocked already.

Article II, Section 8 of the code defines "sales agents" and provides for regulations concerning them to be subsequently proposed and adopted. This matter has previously been dealt with under the heading "Customer Classification", but is mentioned again at this point because of one of the purposes of this provision, to prevent the granting of additional allowances to dealers through the use of a sales agency status.

Certain small manufacturers and importers on October 21, 1933, proposed a code for the industry from which certain sections in the code proposed by the Institute had been deleted. Among those deleted by the small manufacturers were Article VIII, Section 18 (which was not contained in the final approved code, as was discussed above), Article VII, Section 17 (regulating the return of merchandise), Article X, Section 2 (regulating freight charges), and Article X, Sections 9 and 10 (standard trade discount). (*)

6. Restrictions on Sales to Certain Classes of Outlets.

The code contained several provisions which restricted sales to certain classes of outlets, mostly through the use of an unfavorable price differential.

The provision of this type which raised the greatest controversy was Article VII, Section 1, which prohibited sales at the 40% trade discount to dealers who also handled imported goods which did not come up to standard specifications after such standards were approved. Considerable discussion concerning this provision has already been dealt with in several sections of this report.

In a brief to the NRA in reply to a petition for code amendment filed in behalf of two small manufacturers, the Code Authority made the following statement concerning Article VII, Section 1: (**)

(*) See Deputy's Files - Volume A, pages 221 et seq.
(**) See Deputy's Files - Folder 2

"The Section concerned does not establish a boycott. It merely places dealers who operate disadvantageously to the interest of the manufacturer and his wage scale, at a disadvantage in buying standard domestic pencils from domestic manufacturers. Dealers can buy and sell all the imported pencils they choose. If they assist foreign manufacturers in breaking down American standards they are not excluded from buying domestic pencils. They are merely placed at a disadvantage in the discount rate, in buying from American manufacturers. As contemplated originally, the normal trade discount was to be 40% off list. (See Section 10, Article X). Section 1 of Article VII would put dealers selling foreign-made non-standard pencils at 25% off list. This is not the exclusion legally implied by the term 'boycott'.

"It is to be noted that 25% off list was intended to be the maximum discount to be allowed dealers who would not sign the agreement provided for by Section 14 of Article X (suspended) and it is also the maximum discount allowable on direct factory account less than $15.00 net worth of pencils which last Section is approved and in effect. That such discrimination is not a boycott was perfectly apparent to Messrs. Keating and Blackwell Smith.

"The reason for the discrimination is perfectly simple. The consumer has been well educated to accept a yellow, hexagonal pencil with a gilt tip and a red eraser as indicative of a 5¢ quality pencil. It has been the present and profitable fancy of some of the smaller manufacturers who did not sell many 5¢ pencils to make a colorable imitation of the 5¢ pencil and sell it in large quantities at a 2 for 5¢ pencil price, to dealers who pass it off on the unsuspecting consumer as a 5¢ quality and at a 5¢ price. This is one of the practices which the simplification schedule will eliminate and which the petitioners seem to want to retain. The foreign manufacturers, to whom the schedule will not apply, can destroy the effectiveness of the schedule unless some check can be put on the distribution of non-standard pencils. And if he does break down this schedule with the assistance of dealers, the domestic wage scale will go with it."

Other statements by the code proponents and the Code Authority have previously been reported elsewhere in the report, so are not repeated at this point.

The files contain considerable criticism of Article VII, Section 1, much of it subsequent to the effective date of the code and in spite of the fact that the provision was suspended at the time the code was approved.

On November 10, 1933, the National Council of American Importers and Traders, Inc., wrote a letter to Donald Richberg objecting to code provisions which boycotted imported goods, and citing Article VII,

Section 1, as an example. The letter stated that Congress handles imported goods in a separate manner and sets up such duties as it deems advisable; that Congress specifically provided Section 3 (e) of Title I of the National Industrial Recovery Act in case additional protection against imported goods was deemed necessary for domestic industry. The letter further states that the consumer makes his choice between imported and domestic goods, but that domestic industry has no right to boycott imported goods through codes, thus preventing this choice. Certain cases are cited in authority for the statement that only under the tariff laws, or said Section 3 (e) of the National Industrial Recovery Act, has the President the right to restrict importing. (*)

The Consumers' Advisory Board in a report before approval of the code, recommended deletion of Article VII, Section 1. (**)

The National Retail Dry Goods Association (representing 4,000 department, dry goods and specialty stores) wrote a letter on November 1, 1933, objecting to certain of the code provisions. One protest related to Article VII, Section 1, which the Association felt should be deleted. It objected to the assumption of this industry that it controls retail distribution of lead pencils in the manner contemplated. It states that it is in sympathy with the industry's desire for protection from inferior foreign-made lead pencils, but thinks it improper to give manufacturers such stringent control of the activities of retailers. (***)

The Limited Price Variety Stores Association, Inc., (5¢, 10¢, etc. stores) in a letter to Deputy Paddock, agreed with the objections made by the National Retail Dry Goods Association. This association is also opposed to all provisions amounting to a boycott, and feels that retailers should have a say in all provisions affecting them.(****)

A letter from R. R. Yates (bank supplies), Joliet, Illinois, stated that he handles German indelible pencils as none in this country fulfill the requirements of his customers and that Article VII, Section 1 would make him drop this line or handle imported goods exclusively. (*****)

The files also contain a letter from Caron Gottlieb, L. Gottlieb and Sons, Inc., New York, New York (wholesale stationers and importers) protesting against certain sections of the proposed code. He objects to Sections 1 and 2 of Article VII, on the ground that it will stop all importation of lead pencils, as foreign gradings do not usually conform to standard specifications - that grading differs in Germany from that of American manufacturers. (******)

(*) See Deputy's Files - Volume B-2
(**) See Deputy's Files - Volume B-2, page 156
(***) See Deputy's Files - Volume B-2, pages 26 et seq.
(****) See Deputy's Files - Volume B-2, pages 179 - 183
(*****) See Deputy's Files
(******) See Deputy's Files - Volume B-1, page 34

As contained in the code as proposed at public hearing, this provision was even more restrictive, as it absolutely prohibited sales to dealers handling imported goods which did not come to specifications, rather than carrying out the restriction through a price differential. It may be rather surprising to learn that the "importer group", referred to previously, approved of this provision. Prior to the public hearing seven small manufacturers, including the four "importers", submitted a code which omitted many provisions proposed by the Institute, but the code proposed by the small manufacturers contained Article VII, Section 1, in its most restrictive form. (*)

Article VII, Section 16 (an approved provision), provided that no member of the industry could sell pencils to any export house, except upon conditions guaranteeing that the order was for bona fide consumption in the market for which the goods were ordered. This clause was also contained in the code proposed by the small manufacturers and importers, mentioned above.

R. R. Yates, in the letter referred to previously, objected to Section 16 as an attempt to monopolize export business in the hands of a few, and to prevent American consumers from receiving the more favorable terms which the manufacturers wish to give to foreign buyers. Mr. Yates says that stationers in Canada inform him that they obtain American standard brands 10% lower than they can be obtained in the United States.

The first paragraph of Article X, Section 12, of the code provided that the blank pencils for imprinters of advertising pencils should not be sold to the general trade, but directly only to recognized distributors of advertising pencils whose names are filed with the Code Authority. It further provided for the later establishment of an orderly system for their distribution, subject to the approval of the Administrator, to prevent unfair competition, or competition between blank pencils and standard commercial products. This provision was suspended at the time the code was approved and was never reinstated. However, it was of particular interest to the Code Authority as shown by the fact that its reinstatement was requested at a time when the Code Authority requested the suspension of several other code provisions until such time as the provisions stayed in the Order approving the code were reinstated. In this connection, the code authority stated in a brief signed by Colonel Gaskill:

> "The purpose of this first paragraph of Section 12 is to regulate the distribution of blank pencils, that is to say, pencils without any name or brand thereon; To prevent the sale of this anonymous product to the general trade, and to direct its sale to those who purchase these blank pencils for the purpose of putting them in advertising form. This will in no way restrict the sale of pencils

(*) See Deputy's Files - Volume A, pages 221 et seq.

imprinted with the name of the manufacturer, or dealers product brand pencils, or pencils stamped with the name of the consumer. It places the distribution of these blank pencils in the hands of the advertising specialty manufacturers who buy the blank pencils and print advertising material thereon. The object of the regulation is to direct the sale of blank pencils to this channel and keep them out of the hands of "gyps" who buy job-lot blank pencils and offer to print consumer or dealer imprints, which are marketed in competition with standard commercial lines which have a manufacturer reputation and good will back of them for the protection of the consumer."

However, the provision was never reinstated in the code as an active provision. (*)

In a code summary dated March 26, 1935, the Consumers' Advisory Board stated: (**)

"In October 1934, the Code Authority apparently having abandoned hope of securing approval of its minimum price schedule, requested exemption from the price filing provisions of the code. The Consumers' Advisory Board on October 23, 1934, recommended that the request be granted. The Board objected, however, to granting termination of the existing stay of the first paragraph of Article X, Section 12. The termination requested would have given the Code Authority power to designate 'recognized distributors' to whom blank pencils might be sold. This would have enabled the Code Authority to prevent mass distributors from securing at a discount blank pencils to be imprinted with their own markings. It was felt that termination of the stay would make possible undesirable discrimination, restrict competition, and tend to freeze the existing distributive set-up. Exemption from the price filing was granted (renewed March 3, 1935 for 90 days) and remained in effect, but the stay of the first paragraph of Article X, Section 12, was not terminated."

This provision was not contained in the code proposed by certain small manufacturers and importers, referred to above.

Furthermore, Mr. R. R. Yates in the letter referred to above, objected to this provision in the following words:

"I buy my blank pencils and take them to my selected imprinter who imprints them in accordance with my order. I have no machinery for this, so the provision would probably eliminate me from this business. The proposed common selling agency would establish a monopoly."

(*) See Deputy's Files - Folder 11
(**) See Consumers' Advisory Board Files - Folder B

Article X, Section 14 of the code has been referred to previously, and was quoted under the heading "Resale Price Maintenance". It is not necessary at this point to repeat the discussion concerning this provision. However, Section 14 provided for a restriction on sales to certain dealers, through the use of an unfavorable price differential.

Section 16 of Article X contained a restriction on the opening of new accounts with small purchasers, the provision reading as follows:

> "Class A members shall not open any new account with a dealer who or which has not bought since January 1, 1931, from the member, upon less than a minimum quantity for shipment at one time, of $100.00 net worth of wood-cased lead pencils; Class B members shall not open a new account with any such dealer upon less than a minimum order for shipment at one time, of $75.00 net worth of wood-cased lead pencils; Class C members shall not open a new account with any such dealer upon less than a minimum order for shipment at one time, of $50.00 net worth of wood-cased lead pencils."

Section 16 was one of the provisions which was suspended on November 23,1934, at the request of the Code Authority. The reasons for the requested suspension are pointed out under the heading "General Distribution".

Both the National Retail Dry Goods Association and the Limited Price Variety Stores Association registered protests against Section 16, in letters previously discussed above. Furthermore, this provision was omitted in the code proposed by certain small manufacturers and importers, referred to previously.

The letter from Caron Gottlieb, referred to above, objects to Section 16 (as well as Section 10) on the ground that the manufacturers should not be permitted to sell to small dealers, the distributor's customer. (The term "distributor" is evidently used here with the meaning of "wholesaler", rather than with the special meaning accorded it by the code proponents.).

The code as originally proposed by the Institute contained certain provisions which placed restrictions on sales to certain classes of customers, but these provisions were deleted after the public hearing and before the code was approved. Article III, Section 9 of the original code prohibited sales to dealers who resold below fixed minima or agreed resale prices. This provision was attacked by the Consumers' Advisory Board, the National Retail Dry Goods Association and the Limited Price Variety Stores Association among others. The provision is of more direct interest in connection with the subject "Resale Price Maintenance".

Another such provision in the original code was Article VIII, Section 18, which prohibited sales to dealers or distributors who violated their own codes, who sold to others so in violation, or who sold by use of loss leaders, premiums, free deals, or commercial bribery.

This provision was attacked by the same groups as attacked Article VIII, Section 9, who stated that through a boycott penalty, the provision attempts to compel dealers and distributors (not subject to the code) to observe conditions dictated by the manufacturers.

At the public hearing on November 6, 1933, Colonel Gaskill of the Institute stated that Article VIII, Section 18 was consistent with the idea of the President's Reemployment Agreement - to strengthen other codes by assisting in their enforcement. (*)

Another such provision in the proposed code was Article VIII, Section 19, which prohibited sales to bankrupts, etc., except for cash until the original indebtedness to members of the industry had been paid in full. The same associations objected to this provision, stating that bankruptcy is controlled by existing law and should not be thus interfered with by a code provision.

7. Restrictions on Size or Manner of Making Shipments.

Several provisions of the code as approved placed restrictions on the size or manner of making shipments. One of these, Article X, Section 2, which was never suspended prior to the Schechter case, read as follows:

> "The member's list prices shall include free delivery on shipments of any quantity to New York City and shall include free delivery throughout the balance of the domestic market only when the weight of shipment is one hundred (100) pounds or more. Any transportation charge in excess of the minimum freight rate on such shipments shall be paid by the buyer, as shall all charges for delivery on shipments weighing less than one hundred (100) pounds, except shipments to New York City. Freight charges shall not be prepaid by members, and when allowable as hereinbefore provided, shall be deducted by customers upon remittance for merchandise."

The Code proponents made no specific statement concerning this provision during the days before the code was approved, although their general policy in regard to all of the marketing provisions is set forth in their letter of transmittal (quoted under the heading "Resale Price Maintenance.")

The Review Board headed by Clarence Darrow in making certain findings against this code, objected to Article X, Section 2, on the ground that it was discriminatory against small enterprises. In answering this charge, Colonel Gaskill, Executive Secretary of the Code Authority wrote: "The answer is that five small units in the industry accept this provision and do not find it discriminatory." (**)

(*) See Transcript of Hearing, pages 299-301

(**) See Deputy's Files

This provision was vigorously protested by two small manufacturers, the Musgrave and Empire Pencil Companies. In a brief filed on their behalf by the law firm of Cooper and Cooper, the following statement was made: (*)

> "Section 2 provides the machinery through 'quantity discounts which are so discriminatory as to ruin petitioners' business unless this section is stricken from the code. Section 2 in substance provides that any customer in the United States outside of New York City may have his shipment delivered free, provided he will contract for not less than 100 pounds of pencils. In an average, according to our statistics, it takes 50 gross, or 7200 pencils to make a hundred pound shipment. Petitioners being comparatively small producers and manufacturing only a comparatively narrow line of pencils, do most of their business on less than 100 pound shipments. Whereas, our competitors, the 'Big Four' - who control the Code Authority - make and sell every character of pencil known to the trade and nationally advertise certain leading five-cent pencils, such as the 'Mikado' of the Eagle Pencil Company, the 'Velvet' of the American Pencil Company, the 'Ticonderoga' of Joseph Dixon, and the 'Mongol' of Eberhard Faber. These leading pencils, being nationally advertised, are in national demand, some of which are purchased by practically every stationer or pencil customer in the United States.
>
> "Section 2 now comes in to discriminate against the small producer when the salesmen from one of the 'Big Four' offers to sell the customer one gross of 'Mikado' or other nationally known pencils at $3.48 per gross rather than at the usual price of $3.80 or $3.84 per gross, - provided the customer will buy enough of his cheaper pencils to make up 100 pounds. Hence, by means of 'quantity discounts' provided for in Section 2, the customer is forced to buy the pencils of the 'Big Four' rather than those of the petitioners, even though the customer may perfer petitioners' pencils, were it not for the 'quantity discount', which the 'Big Four' are able to give the customer under Section 2 of Article X. According to our information, the 'Big Four' each make several hundred different kinds of pencils; whereas, petitioners only make about two dozen different kinds, all told, practically all of the same selling under five cents."

Article X, Section 7 provided the uniform, standard terms of credit, with an advance dating privilege on orders above certain minimum sizes (the minimum being graded according to class of manufacturer). This provision was never suspended.

While it may seem that this provision is similar in restriction

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(*) See Deputy's Files - Compliance Folder

to other provisions discussed below, about which there was considerable controversy, this provision was never individually or specifically attacked on the ground of this restriction. The code proposed by certain small manufacturers and importers, mentioned previously, contained this provision. (*)

Article X, Section 16, which was quoted and discussed under the heading "Restrictions on Sales to Certain Classes of Outlets," contained a restriction based upon the size of new orders. Further discussion of this provision, however, is not necessary at this point.

Article X, Section 18 has been previously mentioned under the heading, "Quantity Discounts". This provision reads as follows:

> "No Manufacturer shall ship to any direct factory accounts on an order for less than $15.00 net worth of pencils, at the maximum discount off list price. Orders for smaller quantities shall be billed at twenty-five (25%) per cent off list."

At the public hearing on November 6, 1933, Mr. Hall, on behalf of certain small manufacturers, stated a vigorous protest of Section 18. "We have to get small orders to get in the trade, and this provision would keep us from getting sample orders at all, to try our products." Mr. Woosley of the National Pencil Company, then stated that he believed a legitimate dealer should be permitted the 40% discount on an quantity he wanted, "this being a day of quick shipments and small orders." Mr. Elmer of the Eberhard Faber Pencil Company retaliated with a statement to the effect that Mr. Woosley must be practically a retailer, not a manufacturer. (**)

Colonel Gaskill of the Lead Pencil Institute then made the following statement with reference to Section 18:

> "Sometime ago the members of the Institute became alarmed at the amount of small volume direct retailer transactions which they were obliged to carry on. A study disclosed the fact that it cost the manufacturer from $2.10 to $2.40 between the receipt of an order and its shipment from the shipping room. Thus, unless the order was large enough to carry that handling cost, it was taken at a loss. This proposed provision attempts to eliminate that loss and to throw as much volume as possible back to the trade. The larger the volume handled by the trade, the smaller the margin they will need - thus this would make it possible to reduce the distributor's margin. It was to compromise with the necessities of the smaller manufacturer that the limit was placed at $15; otherwise the larger manufacturers would have preferred a higher limit.

(*) See Deputy's Files - Volume A, pages 221 et seq.

(**) See Transcript of Hearing, pages 238-249.

"The National Pencil Company came into the industry at a period of distress - presumably with knowledge of these conditions. The pre-existing industry should not be required to pay the way of the National Company in finding its way into the market. It whould not be allowed to under discount other manufacturers in order to obtain a position in an industry already chocked with excess capacity. It has a right to demonstrate its legitimate place upon the same terms and conditions as the other manufacturers. If the older manufacturers have already proved to themselves that it must relieve themselves of a part of the cost of handling small direct orders and shift this volume to the trade, Mr. Woosley should comply."

Mr. Woosley then replied to Colonel Gaskill, as follows:

"It does not cost the National Pencil Company anything like $2.15 to handle an order. We do not have to justify our right to go into business. The larger concerns have a background of long and costly advertising - they are well known. They have much money for advertising - which we do not have. We want to demonstrate our product to users and ask the right to put out samples of our products."

The brief filed by Cooper and Cooper, referred to above, contained an objection to Section 18, stating:

"Section 18 is particularly discriminatory against the small producer who sells a limited line of merchandise which he is trying to get before the trade, and this section completely overlooks and overrides conditions and practices common in distribution occuring in the development of new accounts, of handling fill-in orders, and other customary practices."

The National Retail Dry Goods Association in a letter dated November 1, 1933, objected to Section 18, saying:

"Section 18, requiring that orders for less than $15 worth of pencils must be billed at less than the maximum discount, will be oppressive to many small dealers to whom $15 is a large order - and even larger purchasers would have to pay an unjustified penalty for fill-in orders."

This provision was not contained in the code proposed by certain small manufacturers and importers, referred to earlier.

Article X, Section 22, provided minimum quantities for single shipment and billing of special imprints not for advertising and member's standard brands back stamped.

The brief filed by Cooper and Cooper on behalf of certain small manufacturers, referred to earlier, objected to this provision, stating:

"This Section forbids the sale of special imprints

except in certain quantities, etc., and unnecessarily restricts the small producer and discriminates in favor of the larger producer."

At the hearing on November 6, 1933, Colonel Gaskill of the Institute made the following statement generally concerning the policy of restricting small quantity business: (*)

> "The manufacturer, in limiting himself against selling to small quantity purchasers, helps the wholesaler. This minimum quantity was set at a fairly low figure in order to take care of the small manufacturers who do not generally have purchasers of much greater volume. The larger manufacturers would have been glad to set the figure higher, but for the necessary protection to small manufacturers."

(Note: The larger manufacturers could have set the minimums higher as far as they were concerned, for they were classified according to volume. Some of the minimums were graded according to this classification.)

8. Price Discrimination

Article VII, Section 8 of the code read as follows:

> "No member of the industry shall discriminate in price between different purchasers of the same type, except on account of difference in quality or quantity."

(A more or less similar provision was contained in many codes, being considered more or less "standard").

This provision was one of those which was suspended on November 23, 1934, at the request of the Code Authority. No reason specifically directed at this provision was stated by the Code Authority. (Its general reasons for suspension of several provisions will be found stated under the heading "General Distribution").

As proposed for public hearing, this provision contained an additional clause relating to resale price maintenance, which provoked considerable criticism and which was eventually deleted. However, the files contain no evidence of discussion concerning the provision which was finally approved.

As will be found discussed elsewhere under the headings "Resale Price Maintenance" and "General Distribution", charges were made by certain small manufacturers that the minimum prices proposed by the Code Authority under Article X, Section 4, were clearly discriminatory against them and their products. This is not the "usual" type of price discrimination contemplated, but if true, these charges would show a type of price discrimination favoring one group of manufacturers as opposed to another, in the same of their merchandise.

(*) See Transcript of Hearing, pages 230-235.

EXHIBIT NO. 4 (*)

VALVE AND FITTINGS INDUSTRY

I. SUMMARY.

The valve and Fittings Industry includes concerns engaged in the manufacture of various types of valves, pipe-fittings and accessories, which products (either separately on in combination with products manufactured by other industries -- such as pipes of various kinds) are used in assembled units of equipment manufactured by concerns not members of this industry.

The code classifies buyers into 6 groups - Distributors; Pipe Fabricators; Pipe Contractors; General Contractors; Original Equipment; Manufacturers; Consumers.

There are several divisions of the industry, each manufacturing a different type of product. Comparatively few manufacturers are engaged in all divisions of the industry. These are known as "full line producers"; while manufacturers making only a limited number of products are known as "short line producers".

Some producers sell solely through distributors except when selling direct on large projects (usually to the government). Others never sell through distributors, performing their own distribution service through factory warehouses or branch houses.

The code required the filing of prices to each of the classes of trade above set forth, and provided that the "lowest prices that may be filed shall be the prices at which he (the producer) shall sell his products to his Distributors."

The proposed code would have given authority to the Code Authority to establish differentials in price between various types of buyers, with the requirement that the distributor be given the lowest prices. The proposed code also contained a provision requiring producers to exercise due diligence in maintaining resale prices. Neither of the above provisions was approved, and the approved code contained a provision authorizing a "Market Study" by the Code Authority, to consider the functions and services performed by the various types of buyers and the difference in cost thereof, in order that a basis might be shown for the establishment of fixed differentials in price between buyers. Although Committees were appointed to make this "market study", it was not until March, 1935, that any plan was evolved satisfactory to the several members of the Committee, and no report of recommendations was ever made to the Administration.

(*) This Exhibit was written by Marvin L. Shirley.

"Short line" manufacturers opposed the establishment of fixed differentials, contending that such action would result in price uniformity, and that short line producers must be given a differential under the prices of full line producers in order to continue in business. Jobbers prefer to handle a full line produced by one manufacturer, instead of assembling a full line by purchases from several short line producers, and short line producers must make a more attractive price than full line producers in order to induce jobbers to buy from them. "Short line" producers also objected to the resale price maintenance provision, contending that such a provision gave an undue advantage to producers able to sell direct through their own warehouses, while short line producers depending on distributors would have imposed upon them barriers against price reductions not applying to direct sellers.

There was a considerable dispute about the status of "branch houses". The Code Authority proposed an interpretation to the effect that producer controlled selling agencies are subject to code requirements as to pricing, but that independent warehouses were not within the jurisdiction of the code. Differences of opinion among industry members prevented an Administrative ruling on this question. The Code contained a provision authorizing the Code Authority to establish "bases for rendering service out of or through factory warehouses operated by producers" but no code authority recommendation on this subject was ever made. The industry recognized that unrestricted use of factory warehouses might defeat the contemplated establishment of price differentials to different types of buyers.

The code provided for uniform cash discounts and terms of payment and prohibited a number of devices, such as secret discounts, rebates, etc., capable of use in evading the open price requirement.

The only provision remaining in the approved code exerting any direct effect on distribution channels - that providing that no price could be filed by a producer lower than the price filed for his distributors - came into conflict with Executive Orders 6646, 6767, and Administrative Order X-48, permitting prices to be quoted to government agencies 15% under filed list prices. The Code Authority apparently believed that if a producer was to adhere both to the code and to these Executive Orders, producers reducing their prices to the government below filed prices would be required also to reduce their prices to distributors below actual filed prices, in order that no buyer could receive a better price than distributors.

The Code contained a provision authorizing the Code Authority to study the problem of freight allowances but no recommendations on this subject were presented. The proposed code contained a requirement that sales must be made "f.o.b. point of shipment", which was construed by certain members of the industry as giving an unfair advantage to concerns possessing factory warehouses, thus permitting them to absorb freight from factory to warehouse, while concerns not having warehouses would be required to ship f.o.b. factory. The proposed code also attempted to fix a minimum size of shipment on

which any freight allowance could be made. This was protested by members customarily making shipments in quantities less than the proposed minimum.

The Code authorized the code authority to study the question of consignment selling, in order to find a feasible method of terminating this method of selling, but the study was unable to arrive at any conclusions satisfactory to the industry generally.

Generally speaking, the above described code proposals were sponsored by the larger "full line producers" and opposed by the smaller "short line producers."

2. The Industry.

The Valve and Fittings Manufacturing Industry as defined in the Code (*) covers those concerns manufacturing all designs of valves, pipe-fittings and accessories, of all classes of ferrous and non-ferrous materials, for use in the handling of fluids and gases; except concerns manufacturing fittings for use in connection with plumbing fixtures, gas cocks, certain types of cast iron "soil pipe" and "pressure pipe", patented lubricated valves, pipe nipples, and valves and fittings for use in assembled units of equipment manufactured by concerns not basically a member of this Industry.

Attention is called to the fact that in the definition of "Members of Industry", the following appears: "and any Pipe-Fabricator who assembles any of said products with pipe fabricated by him, for sale" and in the definition of "Trade Factors", there is set out: "Pipe Fabricator - one whose principal business is the threading, flanging, bending, or otherwise fabricating of pipe to specifications and dimensions, and who also may purchase products of the Industry for assembly therewith, for resale to contractors or consumers". Thus a "Pipe Fabricator" on one hand is a producer of products of the Industry, and on the other hand is a purchaser of the products of the Industry from other producers. The reasons for this dual definition will be given in a subsequent section of this report. (Customer Classification).

Statistical information on the Industry is not available for any practical use. The Industry, as defined in the Code, cuts across the classifications used in the collection and tabulation of official statistics. (Extracted from report of Research and Planning Division, September 23, 1933.) Further, it is noted that available files reveal little information in regard to practices in the Industry prior to the presentation of the Code, nor does it seem that any investigations were conducted to determine the correctness, or otherwise, of statements made, or the need or desirability of proposed Code provisions.

(*) Code No. 153, Article II, Definitions.

The Valve and Fittings Institute, New York City, sponsors of the Code, was formed on January 26, 1933, as a result of the consolidation of the National Association of Fittings Manufacturers (organized May 27, 1930) and the Valve Institute (organized in August, 1930).

According to their own statement, the Institute represented on August 28, 1933, 44 out of 57 manufacturers of products eligible to membership in the two old Associations (as mentioned in the preceding paragraph), and in 1932, $31,432,976 out of a total volume of business of $33,318,954 in these products. (*)

In 1928 this portion of the Industry was composed of 56 concerns, employing 30,178 persons; aggregate invested capital $207,127,896; aggregate annual sales $116,255,765; aggregate production capacity $147,508,906. Comparatively the figures for 1932 were: Number of concerns 57, employing 16,272 persons; aggregate invested capital $172,993,154; aggregate annual sales $32,816,273; aggregate production capacity $156,698,296. (**)

Mr. George V. Denny, President, Valve and Fittings Institute, in an undated memorandum (Volume A) advised that 29 members of the Valve Division and 26 members of the Fitting Division had signed or would sign the Code. (These are the Divisions originally sponsoring the Code). Mr. Denny advised that the Association of Wrought Iron Seamless Steel and Welded Pipe Coupling Manufacturers had voted to join the Institute and support the Code, but he did not state the number of concerns involved. The Pipe Union Group represented 12 additional Institute members, the Brass Fitting Group 10, the Low Pressure and Radiator Valve Group 12, and the Steam and Fluid Specialty Group 30. Ultimately a total of 183 concerns filed prices in accordance with the terms of the approved Code. (***)

The Industry is geographically located in New England, Middle Atlantic, Midwestern, Southern and Pacific Coast States.

In regard to methods of distribution used by members of the Industry the following is found in the report of the Research and Planning Division, dated September 23, 1933:

> "Products are sold to wholesalers, contractors, equipment manufacturers, and directly to the ultimate consumers for use in the construction and maintenance of buildings, ships, oil refineries, railroad equipment, water-works, and so on. There is no uniform method of marketing, but rather a set of inter-twining routes from the producer to the consumer of valves and fittings. For example, a shipbuilding company purchases items going into the construction of a ship directly

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(*) Application for Code, Volume A, Central Records.

(**) Application for Code, Volume A, Central Records.

(***)Page 19, Transcript of Hearing - April 15, 1935.

from the producer, while at the same time purchasing maintenance items for his shipyard from a wholesaler."

A member of the Industry, Mr. J. R. Stenneck, of the Illinois Malleable Iron Company, in connection with distribution methods, said:(*)

> "In other words, the Producers, as classified in the Code before you, are not all starting from the same point and do not employ the same method of distribution. For instance, some of the manufacturers making the full line of valves and fittings are in position to cultivate the architects, frequently performing engineering work for the architect in writing specifications for which they make no charge, have a sales staff who develop business among consumers, are able through the large variety and volume of their business to indulge in expensive National advertising campaigns and who are able to create in that way a market for material that enterprises with smaller capital, making a restricted line, cannot afford."

On the same subject the following statement was made by Mr. Thomas J. McFadden, Counsel for the Code Authority:(**)

> "Asst. Deputy Pilkington: Are most of the products of your Industry sold through wholesalers?
>
> . . . . .
>
> "Mr. McFadden: I believe that the practice varies through all possibilities; that is to say, that many members of the industry deal solely through distributors or jobbers, except where they sell direct on large projects, and that usually means Government projects. Some members, I understand, never deal through distributors or jobbers. Some of those have their own factory warehouses and really do a distributing service for themselves; others have what they call branch houses through which it may be that they sell either direct or as jobbers or as retailers. I couldn't tell you the proportion of the respective types of practice, except they are varied throughout the industry and each type is substantially represented."

Some of the competitive practices in the Industry which were deemed unsound by the Code sponsors were the diversified methods of marketing and persistent price cutting. These, it was believed, would be remedied by adherence to employment standards and marketing practices set forth in the proposed Code. (See quotation from application for Code, in the opening paragraphs under "The Code-Trade Practice Provisions").

An inspection of the available files brought to light no information in substantiation of the above statement, nor reasons for the belief expressed.

(*) Page 53, Transcript of Hearing, September 18, 1933

(**) Page 25, Transcript of Hearing, April 13, 1935

The state or condition of the Industry was set forth in the September 23, 1933, report of the Research and Planning Division as follows:

"Both on the production and marketing sides the Industry is complex. It purchases both ferrous and non-ferrous metals and turns them into a large variety of products. One member of the Industry estimated the number of different items produced at about 35,000, requiring about 250,000 different parts. Some of the products are made to specifications while others are standardized and can be stocked.

"Due to the absence of statistical information a rough indication of the size and present state of the Industry was obtained from members of the Industry. They stated that in 1930 there were about 150 concerns doing a business between $150,000,000 and $200,000,000, and employing some 40,000 people. ..... By the first half of 1933, it was estimated, sales had fallen about 70 per cent and employment about 50 per cent below the 1930 level.

"The depression had not only been severe in its action on sales and employment, but had also seriously impaired the working capital of the Industry. While only 28 per cent of the total invested capital was lost between 1930 and 1933, 60 per cent of the 1930 working capital was lost according to estimates of members of the Industry.....

"In common with most capital goods industries, this Industry is subject to periods of wide fluctuation. "As a result of the depths into which the Industry had fallen during a depression period, a good deal of sharp price competition had been occurring. .....

"Certain producers in the past - known as short-line producers - have found it necessary to give price concessions in order to remain in business. They produce limited lines of products and freight charges on their shipments run higher because the size of a shipment is smaller than for other producers. Price concessions in the form of discounts are given to make up for the difference in freight charges."

As is the case in most industries in which a wide variety of items are manufactured and distributed to both a national and a local market, there are present in this Industry the opposing points of view of the so-called "small" and "large" producers. "Small" in this Industry is the concern producing only a limited variety of the products of the Industry, generally termed a"short-line" producer; "large" is a concern producing a general range of items, known as a "full-line producer. A "small short-line" producer may be a relatively large producer in point of volume of business, and conversely a "large full-line" producer may be comparatively small.

As an example, it is stated by the Milwaukee Valve Company, Milwaukee, Wisconsin, in their letter of March 5, 1935:(*)

(*) Folder 10, General Correspondence - Deputy Files

"After the Code of this industry was approved, with its price filing provision and ten-day waiting period, we believe the files of the Code Authority will indicate that the full line manufacturers immediately dropped the prices of their low pressure valves to meet those which had generally prevailed with the short line manufacturers. True, the small company is privileged to continue to drop its prices, but it has no other products nor resources to fall back upon while it wages a price war."

3. The Code-Trade Practice Provisions

The applicants for the Code stated in response to Question 6 of the Application referring to "Trade Practices" (practices in the Industry deemed unsound, etc.):

"Cause - Diversified methods of marketing and persistent 'price cutting'.

"Remedy - Adherence to employment standards and market practices set forth in the proposed Code." (*)

As a means of correcting these practices the Industry proposed a Code containing provisions designed to:

a- Define producers and customers.
b- Require open filing of prices..
c- Restrict sales below filed prices.
d- Establish fairness of filed prices.
e- Establish price differentials for various types of customers.
f- Establish price differentials for different types of products.
g- Establish a uniform "quotation policy".
h- Establish a "credit policy".
i- Establish uniform "terms of payment".
j- Establish uniform "terms of shipment".
k- Restrict quotations on indefinite specifications.
l- Establish procedure on "future delivery" contracts.
m- Establish costs for rendering factory warehouse services.
n- Abolish consignment selling.
o- Control sale of distress or obsolete merchandise.
p- Control "Producing Affiliates".
q- Establish stated "Malicious Practices".
r- Limit extent of product guaranty.

These provisions, as approved in the code, as modified or changed on approval, or as disapproved, will be discussed in the succeeding sections under the respective classifications.

(*) Volume A, Part II-B, Central Records

1. Customer Classification

Article II of the approved code contained a definition of "Members of the Industry" reading:

> "The term 'members of the Industry' as used herein, shall mean any producer who manufactures, wholly or in part, any of the products of the Industry, as herein defined, for sale; and any Pipe-Fabricator who assembles any of said products with pipe fabricated by him, for sale."

Markets served by these members were defined as follows:(*)

> "A primary market is that in which a Distributor purchases from a member of the Industry.
>
> "A secondary market is that which may be served by a Distributor."

A classification of the producer's customers was in effect set up by definitions of "Trade Factors" in the Code:(**)

> "The term 'trade factors', as used herein, shall mean:
>
> "Distributor - One whose principal business is the purchase and resale, to consumers or other trade outlets, of products of the Industry, and who maintains a stock of products in sufficient quantity to render normal service to customers.
>
> "Pipe fabricator - One whose principal business is the threading, flanging, bending, or otherwise fabricating of pipe to specifications and dimensions, and who also may purchase products of the Industry for assembly therewith, for resale to contractors or consumers.
>
> "Pipe contractor - One whose principal business is the installation of piping systems not fabricated by himself or fabricated wholly or in part by himself.
>
> "General contractor - One whose principal business is the construction and equipment of a plant for a customer and who sublets the purchase, fabrication, and installation of piping to a pipe contractor.
>
> "Original equipment manufacturer - One whose principal business is the manufacture of devices or equipment in connection with which products of the Industry are used as parts or accessories.

(*) Article II, Markets

(**) Article II, Trade Factors

"Consumer - One who purchases products of the Industry for his own use and not for resale."

It will be observed that "Pipe Fabricator" is defined as a "Member of Industry", also as a "Trade Factor". This dual position of the "Pipe Fabricator" presents a situation peculiar in itself, and because of that there are set forth here the reasons stated in the record:

Record of Public Hearing of September 18, 1933, states on page 4 of the Transcript:

> "Mr. Jupp (Alfred J. Jupp, Chairman of Code Presentation Committee): We regard a pipe fabricator as a manufacturer in so far as his shop operations are concerned. In a very broad sense, pipe fabricators are important manufacturers. They produce pipe and fittings, and many of them have foundries of their own. And whether they fabricate from castings or from pipe and fittings, nevertheless, they produce units which may well be recognized as accessories or fittings in this Industry, covered under the broad definition of our position in the Code."

Again in the Record of the Post hearing Conference held November 14, 1933, the subject is referred to as follows, starting at page 15 of the Transcript:

> "Mr. Jupp: It would be tremendously helpful to us, and very satisfactory to the pipe fabricators too, I can say with authority, to have their position designated as a trade factor among those lists, within that list of trade factors. That would help us very much, because they too buy very large quantities of material, both in some instances from the distributor, and in most instances direct from the producer, so that it would be very helpful if we could have that trade factor under trade factors, as well as designating them as a member of the Industry.
>
> "Now, there is another reason for the dual definition, or dual mention of it. The code applies to pipe fabricators, and the provisions in this code apply to pipe fabricators only so far as their manufacturing activities are concerned. There are some pipe fabricators who also install material in buildings, power plants, etc. We do not presume to govern their activities in this code, excepting those which go on in their shops as manufacturers."

Although from these statements it would appear that the Valve and Fitting Manufacturers were interested only in having the manufacturing operations of the Pipe Fabricator covered by the Code, it would seem that by including him as a member of the industry they have covered not only his manufacturing operations, but also his selling operations. By also including him as a Trade Factor, they likewise have covered his buying operations, when he does not fabricate his own valves and fittings. If these provisions were applied literally as written, it would result in placing the Pipe Fabricator

in a position where the code would control both his purchases of products and also his sales, whereas the Pipe Fabricator who manufactures his own valves and fittings would not be so controlled insofar as his purchases are concerned.

However, no complaints from Pipe Fabricators appear in the files, and consequently it is not clear exactly how the provision operated. Possibly, in application only the manufacturing operations were conducted under the code.

Having established by definition, the several types of Industry customers, the price filing section of the Code (Article IV, Section 1, Paragraph 1) required each Member of the Industry to file "his prices to each of the Trade Factors defined in Article II, provided that the lowest prices that may be filed shall be the prices at which he shall sell his products to his Distributors."

This restriction as to "lowest price" was approved by the Legal Division in its report of November 27, 1933,(*). "This provision has been passed on the assumption that this represents the uniform existing practice. Mr. Denny (President of the Institute) assures me that this is so; but on such a matter, the Legal Division leaves the finding of fact to you (the Deputy)." The available files reveal no substantiation by the Deputy of the fact presumed above by the Legal Division, notwithstanding which on the same date - November 27, 1933 - the Legal Division approved the Code (8th Revision) without qualification.(**)

Further, the Code provided(***) "In all practical instances, a member of the Industry shall employ the pricing system of 'list price subject to discount or plus percentage."

In connection with this provision the following statement is found in the Code History, Page 87:

> "The industry's generally accepted method of pricing was on a basis of plus or minus percentages (discounts) applied to standard list prices used by most members of the industry. Most prices, when filed, merely consisted of a set of plus or minus percentages that were to be applied to such standard list prices."

By code provision, therefore, an industry practice was continued by each producer setting forth in his filed prices his discounts for each type of Trade Factor.

Code provisions in which it was proposed that the sufficiency of

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(*) Volume B-III

(**) Volume II, Central Records

(***) Article IV, Section 1

prices filed by any producer could be reviewed by a central agency, and perhaps revised upon the demand of the central agency requiring all producers to file similar prices (item for item) for each Trade Factor, were included in the original code,(*) but these provisions being regarded by the Administration as instruments of "price fixing" were rejected before approval. Thus the code as approved placed no restrictions on any producer to filing whatever price he chose for each type of "Trade Factor", subject only to the provision that none of his prices could be lower than his price to his Distributors. Filed prices were "open to the inspection of members of the Industry".(**)

The available files reveal no objections to the "Customer Classification" policies stated in the Code, as tied in with the open price filing provisions. Apparently only five complaints were filed alleging violation of the "filing" provisions. The lack of available evidence makes it impossible to draw any conclusions on the operations of these provisions.

(*) Proposed Code, Volume A, Article II, Section 1, Paragraphs 6, 7, 8, 9, and 10

(**) Code Article IV, Section 1, Paragraph 4

II. RESALE PRICE MAINTENANCE

The Code, as proposed, in Article IV, Section 2, paragraph 2,* provided a definite resale price maintenance policy, as follows:

"Each producer shall instruct Distributors (Primary Market) of his products with respect to his factory-shipment resale prices for application to various classes of trade in a secondary market, (other than Distributors), and the Producer shall exercise due diligence in maintaining adherence to his Distributor's local out-of-stock price policy and instructions in regard thereto."

Small or short-line producers questioned the inclusion of this policy in the Code, first on the grounds of doubtful legality, and second that it would be of undue advantage to Producers quoting direct to the Secondary Market and to the disadvantage of the Producers who confine their quotations to the Primary Market (Distributors).

In connection with the above the following excerpt from the record will be of interest:

Mr. J. R. Steneck, on behalf of the Illinois Malleable Iron Company, at Public Hearing of September 18, 1933, states at Transcript 54, following a statement on other code provisions:

> "Section 2, Paragraph (2) of Article IV 'Gradation of Price Rates", I am going to offer an amendment on that for the reason that in establishing the resale price -- perhaps I am touching upon a legal phase, but as a layman I hope I may be excused -- there is a wide divergency of opinion. As far as we can determine price level, the whole question of resale is in a chaotic condition. And I am advised that until the Congress passes a comprehensive act clearing up ambiguities and clouds on the present phase of the resale situation that it is much wiser for a manufacturer to suggest to his distributor a proper price and not issue a mandate. I therefore propose that that clause be changed to read -- 'Each producer shall advise distributors of his products as regards his factory - shipment prices applicable to various classes of trade in a secondary market and the producer shall earnestly endeavor to secure the maintenance of these prices by his distributors'."

Also note statements in letter from Mr. F. L. Uhl, President, Detroit Brass and Malleable Company, Detroit, Michigan, dated September 27, 1933**

> "With regard to the Re-instatement in the form in which it is written in the Amended Code dated September 20, we believe provision should be made in Paragraph 1 providing differentials in the

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(*) Proposed Code - Volume A - Central Records

(**) Volume B-III

price for the various Trade-Factors, in the Secondary market. We insist, however, the provision should be made to prevent a Producer from giving as low a price to any of the Trade-Factors in the Secondary market as that given to the Primary market (distributers), as a provision to quote as low a price to the Secondary market Trade-Factors as they quote to the Primary market (distributors) would be distinctly to the advantage of those Producers quoting direct to the Trade-Factors in the Secondary market and to the disadvantage of Producers who confine their quotations to the Primary market (distributors). Also paragraph as re-instated will result in forcing other Producers to quote direct to Trade-Factors in the Secondary market.

"We believe this Paragraph as reinstated will be of particular benefit to so-called full line Producers and also to the full line Fitting Producers as well as to the full line Valve Producers. We further believe that this Paragraph would operate to the disadvantage of the Primary market (distributors) in that it will tend to take away from them the possibility of furnishing these larger specifications as the producers may then quote these specifications at the same price as the Primary market (distributors) has to pay. Therefore, the distributor who must carry a stock for normal requirements of the Secondary market is eliminated from the opportunity of securing the volume factory-shipments."

On the other hand, in protesting against the dropping of the "Gradation of Price Rates" from the Code, Mr. W. R. Dennison, a member of the Legal Committee of the National Emergency Committee, representing the Industry of Wholesale Plumbing products, Heating Products and/or Pipe Fittings and Valves in the name of the following associations:

Plumbing and Heating Wholesalers of New England, Inc.
New York State Assn. of Plumbing & Heating Supplies, Inc.
National Pipe and Supplies Association
Western Supply Association
Central Western Wholesalers' Association
Chicago Credit Bureau

said: (*)

"There are one or two things, however, that we wish to take exception to, and representing, as I do, the wholesale association, I am authorized to speak for them, and I would like to first refer to that section of the Code known as Article IV, understanding as we do, that the original copy of the Code included a section known as gradation of price rates, and that subsequently this section was removed from the code by officials of the Administration.

"It is the opinion of the National Emergency Committee that the above code is rendered ineffectual by the removal of the above referred section, and if this Code is to effectuate in the valves

(*) Starting at Page 79 of the Transcript of Public Hearing, September 18, 1933.

and fitting industry the policy of the National Industrial Recovery Act, this section should be reinserted in the Code. Certainly, in no other way would it be possible for the producers to provide a place for the economic distribution of their products unless they are able to do so under this section, which has previously been removed."

The NRA Legal Division suggested* that the end desired might be attained by providing that producers offer to distributors contracts subject to terms and conditions prescribed by the President, wherein distributors agree to re-sell at not less than prices stipulated by producers. The following Code provision whereby the use of a resale price maintenance arrangement is made permissive was suggested:

"Each Producer may enter into an agreement with each of his Disbributors, whereby such distributor agrees to maintain the resale prices stipulated by such producer.".

The NRA Legal Division in its report said further:

"Under some circumstances, the control of resale prices may be made compulsory. Thus, if a very substantial proportion of sales to retailers in the industry are made direct by manufactures, and the balance made through distributors, a degree of compulsion as to resale price can be provided for..."

Inasmuch as none of these provisions were included in the final approved code, but a Market Study substituted, as hereinafter explained, nothing further was developed in this connection.

The proposed Code also provided** that from time to time the Institute (later Code Authority) shall establish such gradustions in factory-shipment price-rates for the various Trade Factors as may be justified to preserve the current economic status of the primary and second markets; it further provided that the lowest price to any factor of the primary or secondary market shall be the price at which a producer may sell to his distributors.

This provision, coupled with the proposal that the Institute be given the power to determine whether published prices were fair or otherwise, would very probably have resulted in definite price fixing, including the fixing of resale prices by indirect compulsion if in no other way.

The Institute, in support of its plea for approval of the foregoing mentioned provisions, states in its letter of October 10, 1933*** as follows:

(*) Memorandum dated October 13, 1933 - Volume B-111 - Central Records

(**) Proposed Code - Article II, Section 2, Paragraph 1, Volume A - Central Records.

(***) Volume A, Central Records.

"Said paragraphs are economic provisions, in the purest sense. They are essential to stabilization of the primary and secondary markets served by this Industry, and the dire need of introducing such stabilization with the least practicable delay can be evidenced by no more practical facts than those coldly illustrated by the decline of approximately sixty (60) per cent in the Industry's working capital, as directly caused by destructive price competition, during the past three years, and by the further definite fact that without early substantial relief from its present status, Code or no Code, this Industry will be unable to participate in the furtherance of the social and economic objectives of the Act. The Industry is not now in a position to assume and perform the obligations of the Code without the relief proposed. A mere open-price plan would be useless in the present emergency."

The price review provisions proposed in this Code were not approved; therefore, the Code Authority was without power to exercise any measure of control in this regard, and consequently any statement as to their probable effect in operation would be conjecture.

Mr. F. A. Newberry, the Newberry Manufacturing Company, Monroe, N. Y., opposed the approval of these price control provisions, stating at the Public Hearing of September 18, 1933.*

"We take objection to Article IV, Section1, Paragraphs 6, 8, and 9, for the reason that we feel that those paragraphs as written eliminate the small manufacturer from the picture entirely, and we happen to be one of the old, real old manufacturers who have been in business over forty years, that are vitally affected by this clause.

"Our objection is to the fact that making, as we do, a very limited line, we have been obliged to have a price differential which has been conceded for over forty years or more because we sell a part of the steam line only and not the whole line, and we feel that as far as unfair practices are concerned, as known before, that we have been probably nearer following the code than any other manufacturer in our discount sheet as it has always been our price and never has been varied from.

"We feel that submitting this to a commissioner we (who) shall have power to determine whether our prices are right or not, based on the prices of others, is unfair to us, because we know that the first thing that will be done will be the elimination of the 5 per cent and the elimination of our small group of manufactures from the picture entirely. For this reason we protest against Article IV, this section which gives the Council the power to fix our prices of our discount sheet are unfair."

In brief filed subsequent to the hearing and dated October 2, 1933, the Newberry Manufacturing Company said.**

(*) Transcript, Page 42
(**) Volume D-III, Central Files

"We object to giving the Council composed entirely of our larger competitors the power to fix our prices and we further object to their authority to make these prices effective for us in advance of the decision of the Board of Appeals, feeling that as administered it will eliminate short-line manufacturers.

"Our concern is one of a small group of fitting manufacturers making approximately twenty-five items of cast iron fittings out of several hundred items in common use. One output in 1932 was .429% of the total business.

"All goods made by us are standard. ... During the last forty-five years it has been necessary for us to sell our goods lower than the full line manufacturers in order to induce the jobbers to split their orders. At even prices the manufacturer able to furnish the complete line will get the business, the spread during the last ten to fifteen years having been 5%. This at least has been passively conceded and by a resolution allowed to use at a meeting of the Valve and Fittings Institute while considering the code the past summer.

"That this is a very real menace to our future operations is borne out by a statement made to the writer by one of the full line manufacturers 'that it is just too bad but that we were done as far as fittings were concerned' and the statement reported by our New England representative, on the part of the large manufacturers, that as soon as the code is signed the small manufacturers are climinated."

In lieu of the proposed price-control or price-fixing provisions proposed the approved Code provides for a "Market Study" to be made by the Code Authority relative to gradations of factory-shipment price rates for the various Trade Factors, the study to consider the functions performed and services rendered by the various Trade Factors and the difference in the cost thereof.* No report was submitted to the Administration on this subject by the Code Authority, due to inability of the Industry to agree within itself on recommendations to be made.

The Code Authority appointed several committees under the "Market Study" provisions of the Code. In this connection the following remarks are found in the Code History (starting at page 35):

(4) Market Study Committee:

"Pursuant to the provisions of Section 2 of Article IV the Code Authority appointed a 'Market Study Committee' at its meeting of January 3-4, 1934. The purpose of this committee was to undertake the study of recommendations - relative to gradations of factory-shipment price rates for the various trade-factors which study shall have due regard to the functions performed and services rendered by the trade-factors and to differences in the cost thereof.

(*) Approved Code - Article IV, Section 2

"At that meeting (of the Code Authority 6/4/34) the industry voted to reject the report and recommendations of the Market Study Committee."

(5) Committee on Distribution of Products:

"Because of the failure of the Market Study Committee to submit an acceptable program, at its June 14, 1934 meeting the Code Authority voted to create a Committee on the Distribution of Products 'to undertake to set up a plan of distribution that would be satisfactory to the entire industry'.

"If this committee ever functioned the records fail to disclose it. Apparently, the Committee was left 'hanging in mid-air' by the appointment of a Producer-Distributor Relationships Committee."

(6) Producer-Distributor Relationships Committee:

"At its January 30, 1935 meeting the Code Authority authorized the Chairman to appoint a committee to 'develop a Contract Plan with Distributors.'

"The purpose of this committee was to establish rules and regulations for the sale of products of the industry in the secondary market. The work given to the committee was to develop whether a contractual relationship could be inaugurated in the industry between the producer and distributor with a price schedule attached which would indicate the selling price of the producer of these products direct to those in the secondary market. The committee was to obtain under a contractual relationship the same method of procedure for distributors' sales to the secondary market.

"This Committee met with a group of distributors of the products of the industry on March 18, 19 and 20, 1935, and worked out a plan satisfactory to that Branch of the industry. A report of this Committee was scheduled to be presented at a meeting of the Industry held on May 23, 1935. However, no definite decision was reached at this meeting and the plan never forwarded to the Administration for approval."

III. Price Differentials

The Code as proposed,(*) would have empowered the Code Authority to establish gradations in factory-shipments price-rates for the various Trade Factors in order to preserve the current economic status of the primary and secondary markets. A price restriction was proposed that the lowest price for any Trade Factor of the primary or secondary market would be the price at which a producer may sell to his distributors. This last stated restriction was incorporated in the open price filing provision of the Code.

The NRA Legal Division held that if standard differentials in price for the various classes of trade are to be established, they should be based upon differences in costs and services rendered, and further, that the exercise of this power should be subject to approval of the Administration.(**)

No comments are found in the record from Industry members either in support of or opposed to the portion of the provision establishing gradations in prices to various trade factors.

The Consumers' Advisory Board objected to this provision on the ground that it would fix differentials in prices or discounts which each member of the Industry must allow to the various classes of purchasers. This, it was felt, would be a step in the direction of price fixing and would have the effect of dictating to each manufacturer just what channels of distribution he must use. Further, it was felt that such a provision would tend toward uniformity of prices without regard to individual costs or efficiency, or the differences in the manufacturing and sales policies of different manufacturers.(***)

The provision for gradation of price-rates for various Trade Factors was not approved in the Code, but a "Market Study" was authorized to consider the above subject and make recommendations to the Administration thereon. No report was made due to the inability of the Industry to reach conclusions satisfactory to itself. (See comments quoted from the Code History re Committees in preceding section). (also note balance of discussion of these provisions in preceding section)

The Industry's generally accepted method of pricing was on a basis of plus or minus percentages (discounts) applied to standard list prices used by members of the Industry. Most prices, when filed in accordance with Code provisions, merely consisted of a set of plus or minus per-

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(*) Proposed Code, Article IV, Section 2, Volume A, Central Records

(**) Memo dated October 13, 1933, Volume B-III, Central Records

(***) Memorandum, November 28, 1933, Volumb B-III, Central Records

centages to be applied, under stated conditions, to standard list prices. Therefore, if the Administration had approved the plan contemplated in the proposal for gradation of price-rates, price differentials to each Trade Factor would have been uniformly fixed for each member of the Industry.

While "Branch Houses" are not mentioned in the Code, they were a facility operated by some members of the Industry. Attention is called to the following statements in the Code History:

> "Because the products of some members reach customers - including distributors in some cases - not direct from the factories of those members, but from Branch Houses, Subsidiaries or Warehouses, the question arose as to whether such sales could be made by these Branch Houses with impunity, in a manner not permitted by the Code. Stated more clearly the question is, 'Does Article IV, Section 1 of the Code, which requires members of the industry to file prices with the Code Authority, require such members to file the prices at which they sell or offer to sell their products to or through their Branch Houses, Subsidiaries or Warehouses"? On February 21, 1935, the Code Atuhority sub mitted a suggested Ruling upon which it asked on official interpretation. This suggested ruling was as follows:
>
> > 'Ruling: Sales by a member of the Industry must be in accordance with the Code provisions whether or not the goods offered for sale are supplied through a Branch House, Subsidiary or Warehouse operated by the member of industry. Products supplied from these sources are subject to the same Code requirements regarding the filing of prices which apply in transactions where the member of the industry supplies products direct from his factory.
> >
> > 'Where, however, the branch House, Subsidiary or Warehouse is in fact an independent business entity, distinct from a member of the Valve and Fittings Manufacturing Industry, transactions by such a Branch House, Subsidiary or Warehouse are not within the jurisdiction of the Code for the Valve and Fittings Manufacturing Industry unless such producer of products of that industry and therefore on its own behalf a member of such industry. In any such case, however, any sale of products of the industry. to such an independent Branch House, Subsidiary or Warehouse is a transaction by a member of the industry and is subject to the requirements of the Code for the

Valve and Fittings Manufacturing Industry, including the requirements regarding the filing of prices.'

"Discussin of the suggested interpretation between representatives of the Code Authority and the Administration developed differences in opinion as to the statue of branch houses which on some occasions acted as distributors and on other occasions, as factory offices. It became evident that further facts would have to be obtained and considerable thought and study given to the problem from both legal and economic standpoints. Therefore, on March 19, 1935, the Code Authority withdrew its request for interpretation in order that it might give the subject further consideration. The question was not resubmitted to the Administration prior to the expiration of the Code.

"The status of branch houses was a serious matter with respect to the Valve and Fitting Code as several members of the industry, such as the Crane Company, operated branch houses which were classified as distributors by the member operating them but which, from the standpoint of corporate structure, were merely factory sales offices under a branch manager, and therefore as much a part of the parent company as the headquarters office itself."

Trade-Factor price gradation proposal been approved, this problem might have been solved by determination of the exact status of Branch Houses, either as distributors, or as integral parts of the parent company. Had a definite decision either way been issued by the Code Authority the difficulty probably would have been overcome. However, such a decision was not forthcoming.

Another channel that might be used to defeat price differentials for customers is the "Factory Warehouse". This possibility was apparently recognized by the Industry, as they proposed the following provision: (*)

"Factory-Warehouse Policy. From time to time, the Institute shall establish bases for rendering service out of or through factory-warehouse operated by Producers and for rendering other classes of special delivery services."

This provision was approved substantially as submitted, (**) with the addition of a safe-guarding clause that the Code Authority submit its recommendations to the Administration. No recommendations were ever submitted.

(*) Proposed Code, Article IV, Section 10, Volume A, Central Records.

(**) Approved Code, Article IV, Section 10

In connection with sales through "Factory Warehouses", at its meeting of August 24, 1934, the Code Authority approved the following resolution:

> "THAT IT is a violation of the Code for any member to sell to its Branches or Subsidiaries (whether wholly or partially owned) at a price below their lowest filed price to Distributors, or to make allowances or rebates of any kind that would bring the price below that filed price.
>
> "THAT the sale by a Branch, a Subsidiary (whether wholly or partially owned) or a Warehouse, to a Distributor, at a price lower than the price filed by a Member of the Industry to the Distributor, be interpreted as a violation of the Code."

Under date of September 18, 1934, Assistant Deputy Administrator Pilkington, wrote the Code Authority in part as follows:

> "It is the opinion of the Administration that the Code Authority for the Valve and Fittings Industry has exceeded its authority in several directions in resolutions passed at the above meeting."
>
> "Branch Houses and Warehouses. The second part of this resolution was not in order. If there is a complete sale, and in effect, there is no violation of Article IV, Section 1 (5), the resale would not be governed by the prices filed by the member of the Industry."

Except for the presumption that a sale by a Producer to his Factory Warehouse is a completed transaction, the available files do not show any evidence of the reasons for the Deputy's conclusion. In many industries such a transaction is quite properly considered as a bookkeeping transaction only, title not passing until ultimate sale by the Factory Warehouse.

Evidently the Industry by its interpretation undertook to consider the Factory Warehouse as a trade factor when prices were made to it, and as a member of the industry when it in turn sold. The Deputy, by his statement seems to be of the opinion that if the warehouse is a trade factor, then its sales would not be covered, any more than sales by any other trade factor. It would seem that in this he was undoubtedly correct. However, he does not appear to have considered the question as to whether or not the warehouse should be classed as a trade factor, or if he did consider it, concluded that it was properly so classified.

IV. Quantity Discounts

The Code, as proposed and as approved, makes no direct mention of or reference to quantity discounts.

Under the open price filing provisions (*) each producer was at liberty to file quantity discounts or not, as he saw fit, subject only to the requirement that he shall not sell or offer to sell at a price otherorron more faborable terms than those which he has filed and which have become effective. The code provides rules and regulations under which revised prices and terms of sale may be filed.

V. Discounts Other Than Quantity

This Code, in its definition of "Unfair Trade Practices", prohibited the allowance of secret discounts, rebates, refunds, or other concessions, or the extension of services or privileges to certain purchasers not extended to all purchasers of the same class under like terms and conditions. The Code further stipulated the terms of "Cash Discounts" that were to be adhered to by all members of the Industry.(**)

There were several provisions in the Code as approved designed to either prohibit the making of prices or terms of a preferential character and to effectuate standardization of business practices. For example:

Under "Terms of Payment" it was provided (***) that the country be divided into two zones - the "Pacific Zone" including the States of Arizona, California, Oregon and Washington, the "Eastern Zone" including the remainder of the States. The net due date on intra-zone transactions was not to exceed the last day of the first month following date of invoice; the inter-zone due date was to be the last day of the second month. Accounts not paid within the allowable net period were to bear not less than 6% interest.

The cash discount was fixed at not to exceed 2%, and the discount period at not to exceed 10 days, with the following exceptions:

That the period could be extended to 30 days on inter-zone transactions.

Purchasers whose requirements necessitated frequent billings were permitted to deduct cash discount on remittances covering the first half of a month on the 25th instant intra-zone and 25th proximo inter-zone; second half of the month remittance on the 10th proximo intra-zone and 10th of the second month following inter-zone.

No cash discounts were to be allowed on transactions financed through Trade Acceptances or notes.

(*) Approved Code, Article IV, Section 1

(**) Approved Code, Article IV, Section 6, paragraph 3.

(***)Approved Code, Article IV, Section 6, paragraph 1 (a)

Acceptance of Bonds or other Securities involved in financing a project in payment for products of the Industry was forbidden.

Invoices were required to bear the date on which delivery was made to carrier at point of shipment, and post-dating of invoices was forbidden.

These provisions as proposed were approved in the Code.

A. Terms of Payment:

Speaking in opposition to certain of these provisions, Mr. Stebbins, of the Jefferson Union Company, stated at the Public Hearing of September 18, 1933: (*)

> "*** the point I want to speak to is the article which relates to terms of payment. I am also a short-line manufacturer and we make only brass unions. We have been in business 29 years and we have credit terms which are different from the credit terms here. We have no desire to change our credit terms and see no reason why we should change. It would appear that if we give our credit terms and show what we mean by the terms that that should be sufficient. There is no reason why we should have to conform to some particular standard and change our entire method of business which has been followed over a long series of years. That is my objection to Section 6, the terms of payment."

Under date of December 2, 1933, Mr. F. L. Uhl, President, Detroit Brass and Malleable Works, Detroit, Mich., stated in regard to cash discounts: (**)

> "The above refers to terms and cash discounts. We believe that this should be changed to read as follows:
>
> " 'That the purchasers whose requirements necessitate frequent billings cash discount may be deducted for invoices for the previous month on the 10th of the month following when both parties are in the Eastern Zone, or both parties are in the Pacific Coast Zone; or when these parties are not in the same zone on the 10th of the second month following.'
>
> "Our substantiation for the above change is that we believe this is necessary for the reason that the distributors' accounts are so made that the funds in many cases would not be ready for payment until such time; the reason this is true is that some of

(*) Transcript, page 43

(**) Volume B-III, Central Files.

the smaller dealers do not have banking accommodations. The shorter time for discount contained in the Code would certainly work a hardship on the smaller distributors. It also couses endless confusion between distributors and producers who have but one invoice during the month from a certain producer whereas they may have numerous invoices during the same month from another member of the Industry."

That the Code provisions did not operate to the satisfaction of the Industry is shown by the fact that an amendment to the Code was proposed, which would have, if approved, resulted in the substitution of new "Terms of Payment" for those existing in the Code.

A Public Hearing on this proposed Amendment was held on April 15, 1935, Mr. Thomas J. McFadden, Counsel for the Code Authority, making the following explanatory statement: (*)

> "Your records will show that from time to time over the past ten months both the Code Authority and the members of the Industry, in Industry meetings, have notified the NRA that in their opinion the present terms of payment in the Code, Article IV, Section 6, are inequitable upon members of the industry and their customers, that they do not adequately reflect the established business practice in the Industry, and that they differ considerably from the established practice in allied trades and industries. From time to time the Code Athority has requested consideration by NRA of proposed amendments to this Section of the Code.
>
> "The proposed amendment which has been submitted..... is deemed to be more equitable than the present code provision and more satisfactory to all interested parties. As will be shown a truly representative group in the Industry definitely desires and approves of the proposed amendment and further approves a slight change in the proposed amendment in order to make it more flexible.
>
> "In order to secure pertinent data for your consideration a questionnaire was mailed to all members of the Industry, together with a copy of the proposed amendments. The members were asked whether they approved the amendments as proposed,what their pre-code practice was in regard to terms of payment, what further suggestions they had in regard to the proposed amendment."

The amendment proposed a change in the "net due date" so that it would be not in excess of 60 days from time of shipment, subject to 2% cash discount if paid before the 10th of the month following shipment. The Code requirement of charging interest after the net due period was eliminated.

The Code provision in regard to purchasers requiring frequent billings was eliminated, and in its place the amendment proposed

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(*) Transcript, page 9

continuance of the zone plan providing that 2% may be allowed if payment is made on the 10th of the month following shipment on interzone transactions.

No change was proposed in the 2% cash discount, in prohibiting cash discounts on trade acceptance or note payments, in acceptance of profect securities, or in the dating of invoices.

Continuing Mr. McFadden stated, in regard to charging of interest:(*)

> "It will be noted that the provision requiring members to charge interest after the net due period at the rate of six (6) per cent or other legal interest rate, would be eliminated. Since there is no prohibition in this regard each member of the Industry would then be at liberty to follow his own individual desires regarding the charging of interest. It is further noted that the proposal that the net due date shall be not in excess of sixty (60) days from the date of invoice is simpler and therefore more understandable and enforcible than the current Code provision. Furthermore, with Industry approval it would seem that voluntary compliance is to be generally expected. It is further believed that this one simple rule would minimize objections from different types of customers. Finally, it allows a degree of flexibility among members of the Industry to suit their own desires."

The proposed amendment had been submitted to Industry members by questionnaire. The responses showed a majority of those replying in favor of the amendment. The questionnaire also brought forth information as to the terms of payment of 60 producers in effect before the code. It is interesting to note the variety of terms, especially in connection with any code provision requiring uniform terms:

2% 10 days, 30 days net	14
2% 10th prox 30 days net	9
2% 10th " 60 days net	15
2% 10 days or 2% 10th prox.	7
2% 10 " 60 days net	1
2% 10 " 60 " " or 2% 10th prox.	1
2% 15th prox. 60 days net	1
2% 10th "	2
2% 15th	1
½ of 1% 10 days, 30 days net	1
Net 30 days	8
	60*

(*) Transcript Page 14

(**) Transcript of hearing, April 15, 1935, Central Files

As evidence of the fact that the Industry desired some measure of uniform practice in "Terms of Payment" rather than the variety shown above, Mr. McFadden made this statement at the Public Hearing of April 15, 1935, in reply to the quoted question from Mr. L. B. Lovell (Consumers' Advisory Board)*:

"Mr. Lovell:

"Was it thought ..... by the Code Authority in presenting the Code to begin with, or is it thought by the Code Authority now that a standardization of terms is desirable in itself or that the terms published by the individual companies prior to the code were not lived up to?

"Mr. McFadden: My answer will contain my recollections of what I have heard from the Code Authority and also some gratuitous observations of my own without much knowledge of the industry.

"During the attempts over the past ten months to secure an amendment which was based on the experience that the present Code provisions were too far out of line with too many individual practices. I asked the Code Authority members whether they would not be just as well off if they asked for the suspension of this section and had nothing in its place, and all of the Code Authority members told me that that would be worse than what they have now. Also in the questionnaires they had an opportunity to say in their individual comments whether or not they wanted the whole thing wiped out. I don't recall any of the questionnaires where they gave such an answer but I do recall several of those who objected to the change by saying that they wanted to continue with the Code provision as it is; in other words, I found no expression from any member of the Industry or the Code Authority that they wanted no provision in the Code in this respect. On the other hand, I have had several expressions from them that no provision would be worse than the one they now had. Now, my gratuitous comment in regard to the great differences in practices before is this: That individual members of an industry undoubtedly tried to establish what they thought were reasonable practices but found that to hold certain customers they had to grant different terms to that particular customer; as, for example, in some of the replies that I read several people say their terms were 2 per cent, 10 days, or 2 per cent, 10th prox, so that the different practices of other members of the industry really made it impossible for individual members of the industry to make effective what they thought were the most desirable practices from their point of view, and since it was not crystallized they were frequently unaware of the practices of others and probably granted further more favorable terms merely on the suggestion of the customer without knowing what the industry practice was. All of that, I say, is a gratuitous observation on my part."

(*) Transcript, page 28

In connection with the proposed Amendment, [illegible] establishment of uniform practices, the Consumers' Advisory Board said:*

> "There is no doubt but that the proposed Amendment simplifies the provisions, very possibly it liberalizes them, but there is not enough factual material to indicate that it makes any more reasonable from the point of view of established credit procedure in the Industry. Indeed replies to the questionnaire sent out by the Code Authority indicate a considerable diversity and very little uniformity in regard to terms, before NRA, and hence at best any set of standard uniform (or maximum) terms will be based on the practice of a very few.
>
> "This Board reiterates its preference for a process of deletion rather than of revision in this case. We are unable to see that the Industry has shown cause sufficient to establish a need for standard terms of sale particularly when such provisions appear designed to produce uniformity rather than to cure a specific unfair practice."
>
> "The Board states further that Office Memorandum 228 "looks with disfavor on code provisions enforcing uniformity in component parts of the net price and suggests the procedure mentioned above."

Executive Orders 6646, 6767, and Administrative Order X-48 permitting the quoting of government agencies of prices 15% under filed list prices, may reasonably be construed as affording a discount for quantity purchases.

The open price filing provisions (among others) of this Code were proposed for the reasons set forth in the first paragraphs of this report under "The Code Trade Practice Provisions". The Code Authority in its letter of July 31, 1934 (Deputy's Files, Folder 3) entered a general protest against these Orders and requested a complete exemption therefrom, as follows:

> "First, on behalf of our industry, we renew our general protest against this Executive Order and we renew our request for complete exemption from this Order, on the ground that if defeats the salutary purposes of the open price plan. This purpose is to encourage fair competition on the basis of full and accurate knowledge of competitive conditions. The Executive Order invites a return to secrecy and ignorance. Deeming that the Executive Order, as applied to this Industry, will affect its ability to maintain its present level of wages and employment, we urgently request complete exemption.

(*) Board Files - Report of May 15, 1935

"Meanwhile, acting on your suggestion and in view of the critical situation that already confronts this Industry, we request immediate exemption to the extent that the 15% preferential may be reduced to 5%. We do this on the basis of constant and increasing complaints from members of our Industry to the effect that the Executive Order has already resulted in destructive price competition. Frankly, our Code Authority has not secured complete compliance by all members of the Industry with the requirement that they should file their prices. Our efforts to secure this compliance have been defeated by the Executive Order itself which leads these non-cooperative members to assume that the Administration does not deem it good policy to file prices and abide by them in accordance with Code Provisions.

"Please incorporate our original protest with this. To the best of our knowledge and belief, some members of the Industry have been confused by the Executive Order and are inclined to deviate from their posted prices not merely for the benefit of public authorities but in selling to other customers in a manner which is not justified either by the Code or the Executive Order."

In addition to the foregoing the Code Authority in memorandum dated July 5 1934 (Deputies Files, Folder 23), protesting against the modification of Executive Order 6646, stated:

"Administrative Order X-48 withdraws the protection provided for Distributors and permits any member of a Code to quote any Governmental agency, ... , the same price that is on file for the Distributor. So that the Distributor may not be ruled out of the picture altoghether, following the issuance of X-48, a number of producers ... have filed an additional 5% as compensation to the Distributor for acting as agent and handlihg the business of the producer with the Governmental agency.

"Modification of Executive Order 6646 that permits an extreme discount to governmental agencies beyond the filed prices to distributors of 15% will require an extreme discount of 15 and 5%, unless the Distributor is ruled out of the picture.

"It is a fact that over 50% of all the products of this Industry are distributed through jobbers. Many companies distribute through jobbers exclusively. Over 50% of all government purchases of the products of this Industry are now made from jobbers."

What actually resulted by way of effects on the business with the government previously enjoyed by distributors does not appear in the materials which have been examined.

In connection with the proposed "Terms of Payment" amendment, in following observation is found in the Code History (Page 52):

"The approval of the Amendment re Terms of Payment would have been beneficial to the industry by restoring the 'terms of payment' which were most uniformly employed by the members of the industry prior to the approval of the Code. A large number of complaints of violations of this section of the Code were made during the period of its operation, and thus approval of this amendment would have facilitated the administration of the Code."

B. Terms of Shipment:

The "Terms of Shipment" section in the proposed Code was designed to effect uniformity in practices. *

It was proposed that all domestic shipments "shall be f.o.b. point of shipment." ** This was a departure from Industry practice, and immediately brought forth complaints from small or local manufacturers that if they were not permitted to make freight allowances they would be deprived of the opportunity of selling in any market that they may choose in competition with any and all concerns.***

It was further proposed that there should be no allowance made for all or any portion of transportation costs.****

However, it was further proposed that schedules of freight allowances could be established by the Institute but that such allowances *****should not exceed 200 pounds for brass fittings or 300 pounds for iron fittings.

An example of the protests against the proposed "f.o.b. point of shipment" basis is contained in letter from the Detroit Brass and Malleable Works, Detroit, Michigan, December 22, 1933,******as follows:

(*) Approved Code - Article IV. Section 7

(**) Proposed Code - Article IV. Section 7, Paragraph 1

(***) Letter - Volume B-III

(****) Proposed Code - Article IV Section 7, Paragraph 3

(*****) Proposed Code - Article IV, Section 7, Paragraph 4

(******) Volume B-III, Central Files

"The Code requires that all domestic shipments shall be f.o.b. point of shipment. If this is carried out it certainly would mean a great hardship and possibly the elimination of certain smaller manufacturers who are not located in large distributing centers. While the Code provides that the Code Authority may study the problem of freight allowances and present recommendations to the Administrator with respect thereto it does not make it obligatory for them to do so, and if all shipments are to be f.o.b. point of shipment, which means no freight allowances, it would be giving the larger manufacturers who have factories located in various industrial centers a great advantage over those who have isolated plants. For instance, Crane Company have plants at Chicago, Ill., Bridgeport, Conn., and Birmingham Ala.; while the Walworth Company have plants in Kewanee, Ill., Greensburg, Penn. Boston, Mass., and Attalla, Ala. In our particular case we would be limited within a circle of practically 50 miles. It would be impossible for us to market our goods in New England and the Metropolitan District due to the nearer location of Eastern Manufacturers, or any distributing centers where other producers are located.

"In order to equalize a manufacturer's right to obtain business in all territories there should be a freight allowance set up that would allow all manufacturers to compete on an equal basis. Therefore, pending the Code Authority studying the problem of freight allowances and their recommendations in respect thereto to the Administrator I think it should be set up in the Code that Any Member of the Industry may make such a freight or carrying charge allowance that will equalize freight or carrying charge with the member of the Industry nearest the point of destination."

The "maximum freight allowance" proposal was the subject of debate at the Public Hearing of September 18, 1933, and in subsequent correspondence.

In protest Mr. Charles H. Stebbins, President, Jefferson Union Company, said at the Hearing: *

"Section 7, terms of shipment, paragraph 4, Now, as a matter of practice, that gives a great advantage as it is drawn, to the full line manufacturer, because he can get an allowance on freight and can send a great many things in barrels. As a matter of fact, in my sales experience I find a great many times, with a piece of brass union, such as that, I never have opportunity to get a freight allowance on such parts. I can buy them from the full manufacturer and take in half a dozen different things and have the freight allowance. I think the freight allowance of 300 pounds is entirely too high for the short-line manufacturers and gives

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(*) Transcript, Page 44, Central Files

an unfair advantage to the full-line manufacturer."

The above protest is that the maximum is too high. A protest that the maximum is too low was made at the hearing by Mr. M. W. Dennison, representing the Distributors. (*)

"Further, Article IV, Section 7, known as terms of shipment, the Code definitely limits the power of the Valve and Fittings Institute to increase factory shipment minima as stated in spite of the fact that economic conditions might require such an increase. It is the opinion of our Committee (National Emergency Committee) that this section should be re-written to permit the Institute to charge factory shipment minima according to conditions that exist in the Industry, for in no other way will it be possible to protect the position of the Distributor of valves and fittings in the normal and well established line of distribution. Further, should the Administration approve of the fixation of factory shipment minima, careful study be made by competent persons to the end that the producers of valves and fittings do not set themselves up in direct competition with their distributors."

In support of this proposed provision a letter was received from Mr. F. L. Uhl, President, Detroit Brass and Malleable Works, Detroit, Mich., dated September 27, 1933, (**) reading:

"We believe that the entire paragraph should remain in the Code as originally presented. Should the position now asked be deleted as requested in the proposed Amendment, and the Administrative Council of the Industry take action to increases the minimum amount of weight required for the shipment on which freight is allowed, we will be at a distinct disadvantage to those manufacturers making a full line of products. Those manufacturers who make even shorter lines than our selves and those making only individual lines will be under still greater handicap than we are.

"The present method has been in force for a great many years, with the exception of a few weeks during which period an effort was made to increase the amount of weight on which freight allowance would be made from 300 pounds to 1000 pounds. It was found impractical for the smaller manufacturers and shorter line manufacturers to live up to such an arrangement without sacrificing business, and consequently the freight allowance reverted back to the old 300 pounds allowance.

For instance, should the amount of freight on which an allowance be made be increased to 1000 pounds manufacturers making plugs and bushings only or making cast iron fittings only, or making malleable fittings only would have to have a full thousand pounds of each of those lines in order to grant freight allowance to the customer, whereas the manufacturer who makes all of these lines and many more besides could, by assembling all such items together, easily make up the required amount to come within the requirements of the 1000 pound provision.

(*) Transcript Page 78 Central Files

(**) Volume B-III, Central Files

"Therefore, we wish to protest against the proposed change and ask that the Paragraph as printed in the Code, Registry 1335-1-03 as revised August 28, 1933 for public hearing be retained in the Code, otherwise any change made by the Administrative Council of the Industry increasing the minimum weight on which freight is allowed will result at a disadvantage to the smaller Producers."

In the approved Code the "f.o.b. point of shipment" provision and the one prohibiting allowances of transportation charges were deleted. The provision concerning the schedule of freight allowances was changed into one providing for a study of the problem by the Code Authority with recommendations to the Administrator.

The "f.o.b. point of shipment" provision would probably have intensified the Branch House difficulties, referred to under "Price Differentials" earlier in this report. Had it, however, been changed to"f.o.b. Factory" it would have avoided the "Branch House" difficulty.

The section providing establishment of schedules for the allowance, if desired, of freight charges on shipments above 200 and 300 pounds of brass and iron fittings respectively was designed to continue an industry practice before the Code. These weights were defined as maxima in the proposed Code beyond which schedules could not be adopted. Representatives of distributors protested against the definite fixation of maxima, while small or short-line producers held that higher maxima would be oppressive and unduly favorable to full-line manufacturers. (See quotation of these protests in the several preceding pages of this report. Transformation of this provision into one providing for a Code Authority study of the subject, left all members of Industry free to follow their own dictates. No report or recommendation on the subject was ever received from the Code Authority.

C. Indeterminate Specifications:

Under the designation "Indeterminate Specifications" in the proposed Code, * manufacturers were prohibited from agreeing to furnish products for an extended period in such a way that the contract would not conform with later changes made in the price list. This provision was approved substantially as proposed, exceptions being provided for delays not the fault of the purchaser, for future deliveries on definite contract projects, and for orders from original equipment manufacturers for products to be used by them in fabricating other products.

There are no comments in the record either for or against this provision. It was designed to prevent deviations from filed prices by means of a subterfuge, and it was approved substantially in this form, except that certain obvious oppressive features were eliminated as

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(*) Proposed Code, Article IV, Section 8, Volume A, ...

as stated above. *

D. Factory Warehouses:

An Industry practice indulged in by certain producers was the establishment and operation of "Factory Warehouses." It was proposed in the Code that bases (costs) for rendering service out of or through factory warehouses be established by the Code Authority from time to time

The operation of "Factory Warehouses" was protested against by Mr. M. W. Dennison, representing the Distributors at the public hearing of September 18 1933. **

> ".... it is the opinion of our Committee that section 10 of Article IV should be either removed from the Code or revised. As it is now written it would seem to validate the practice of the producers in establishing factory warehouses in various parts of the United States. We are prepared to prove that factory warehouses maintained by producers are not essential inasmuch as the members of the Associations which we represent have for years provided any necessary outlet for the distribution of material produced by members of the Valve and Fittings Industry. In addition the establishment of such factory warehouses from which factory prices are quoted, makes it possible for certain producers to deliver material through concerns not properly equipped, at prices as low, if not lower, than concerns having large investments and employing thousands of people. It is our contention that a continuance of this practice results in discrimination, which is not only unfair but tends to demoralize our Industry."

On March 5, 1935, over a year after the Code had been approved, the Milwaukee Valve Company, Milwaukee, Wisconsin had this to say in regard to "Factory Warehouses": ***

> "Let's consider the subject of warehousing. In the past it was general practice to deliver materials from warehouses at higher prices than governed factory shipments. Warehousing adds to cost, is expensive, and the surcharge practice we considered fair. However, the Code Authority we believe, under control of the larger companies having scattered warehouses, decided that in order to compete with small manufacturers adjacent to the larger cities, the warehouse charge might be dispensed with. Our opinion is that the cost distribution should be taken into consideration in establishing prices.

There is no evidence to indicate that such a situation did exist, but the possibilities are apparent. Such a practice might conceivably serve to materially alter existing distribution channels; however, it might be well to keep in mind the report's earlier comments concerning the variety of distribution methods used by this industry.

(*) Approved Code - Article IV, Section 8

(**) Transcript, Page 80, Central Files

(***) Letter in Deputy Files, Folder 10

The Code approved a study of recommendations * to be made by the Code Authority relative to proper charges, terms and conditions for rendering services out of or through factory warehouses, and for other special delivery services, but no report on the same was ever submitted.

E. Distress Merchandise:

The sale of "Distress Merchandise" - surplus stocks or inventories and obsolete lines - for the purpose of raising cash, was to be sanctioned in thid proposed Code,** such sale to be subject to rules and regulations promulgated by the Code Authority.

It is obvious that the sale of "Distress Merchandise" could be a price-cutting devise, and this provision was proposed in an effort at Industry control.

Objections were raised by several producers to this control device as follows:

Mr. J. R. Steneck, representing the Illinois Malleable Iron Company, at the Public Hearing of September 18, 1933, said:***

> "In times of stress and in acute financial conditions it may be necessary for immediate action - the question of time being in most instances the essence of sale of all distress goods. It is manifestly unreasonable to assume that a bank to whom a producer is indebted will be satisfied by a statement that he can pay the bill by reducing his inventory as soon as his Industry Institute gives him permission to do so."

Further a letter filed by the Illinois Malleable Iron Company, stated at Page 88 of the Transcript****, in part as follows:

> "It is conceivable that the new set-up may entail hardships on individual members as in order to keep going it is necessary to quickly move stock. This condition is made impossible by the section as permission first must be granted by the Council. This again depends entirely on the permission of competitors forming this Council whose locations are widely spread over the country."

(*) Approved Code - Article IV Section 10

(**) Proposed Code - Article IV Section 12, Volume A, Central Files

(***) Transcript, Page 56, Central Files

(****) Central Files

In approving this provision in the Code a safe-guarding clause providing for appeals to the Administrator from decisions of the Code Authority was provided; also provision was included to the effect that if the Code Authority did not make a decision within ten days an appeal could be made to the Administrator.*

This instrument of sales control, preventing as it could the use of one type of subterfuge to effect price cutting was considered satisfactory in operation by the Deputy Administrator.

As witness the following statement with regard to the operation of the same which appears in the Code History (Page 95):

> "In accordance with the provisions of Section 12 of Article IV, the Code Authority gave consideration to the disposal of obsolete merchandise on a number of occasions. The decisions of the Code Authority minutes in the Industry files, Central Record Section. No reports or appeals of unfair decisions reached the Administration.
>
> "It is therefore, assumed that self-government of this industry was successful in this respect."

F. Unfair Trade Practices:

The "Unfair Trade Practices" approved in the Code were substantially those proposed by the Industry,** and were prohibitions against:

1. Interference with making of contract after award has been made, or attempting to induce a breach of contract.

2. Disparaging statements, false or misleading branding or advertising.

3. Secret refunds, rebates or concessions, etc. or any extension of service or privileges to certain purchasers not extended to all purchasers of the same class, or agreement to assist in sale of securities for a customer in which a member of Industry may be interested.

4. Substitution of products other than those described in quotation.

The available files reveal no statements by members of Industry for or against these provisions, and there is on record only one complaint of violation of these provisions, that in regard to contract interference.

G. [illegible]:

(*) Approved Code - Article IV, Section 12

(**) Approved Code - Article IV, Section 14

G. Guaranty of Product:

A definite limit as to the scope of a "Guaranty of Product" that a producer could make was included in the proposed Code and approved." (*)

There is no evidence as to the necessity for this provision, but it is conceivable that a producer could undertake in a contract to provide materials of a quality or character beyond normal expectancy, with the prior knowledge of the purchaser, and then when claims were presented settle them on the justification of the contract guaranty. Thus could preferential and discriminatory prices be granted a particular customer.

There are no statements by members of Industry in regard to this provision, so no conclusions can be arrived at.

(*) Approved Code - Article IV, Section 15.

I. Consignment Selling

As proposed and approved the Code provided* that the Code Authority should study and advise with Industry members concerned in consignment selling in order to accomplish the termination of all such arrangements at as early a date as possible.

An objection to this provision was entered by Mr. Charles H. Stebbins, President, Jefferson Union Company, at the Public Hearing of September 18, 1933:**

> "Paragraph 11. I think consigned stocks perform a very useful service. As a matter of fact there are times where a manufacturer cannot introduce his goods in a locality because all the distributors in that locality, all the large distributors, have a line which is already established. The manufacturer may have a certain demand for his goods in that section but he cannot get any recognized distributor to take on his line because they have already taken on another line so that he has to go to somebody who is, of course, financially straight-forward, honest and capable, but still he may not have a large capital. I cannot see that objection to consigned stocks. I do not see that they should not be permitted. That also gives an unfair advantage to those who have been long established in any particular locality."

The Code Authority was not successful in its effort to secure data from all Industry Members, on which to base its recommendations to the Industry. The Code History (Page 95) contains the following statement:

> "Pursuant to the provisions of Section 11 of Article IV, the Code Authority made a survey of the members of the industry requesting that they submit this information. This survey was not entirely successful as many of the members did not reply to any of the bulletins issued by the Code Authority. The Secretary of the Code Authority made a report to that group on January 29, 1935, setting forth the results of his efforts and at that time he was advised to pursue the matter until all of the required information was furnished. This report was never submitted to the National Recovery Administration."

The fact that this provision was an Institute proposal, and evidently was intended to correct certain Industry practices (on which subject there is no information in the available files), makes the evident lack of general industry interest (post-Code) difficult to understand.

(*) Approved Code - Article IV, Section 11
(**) Transcript, page 44, Central Files

II. Price Discrimination

In setting up the open price filing provisions of this Code it was provided that the lowest prices that may be filed shall be the prices at which the producer shall sell to his distributors.(*) So as to prevent discrimination the following provision was approved:

> "No member of the Industry shall sell or offer to sell, directly or indirectly by any means whatsoever to any Trade-Factors, any product of the Industry at a price or on more favorable terms and/or other conditions of sale other than those which he has filed with the Code Authority and which have become effective."

The phrase "to any Trade-Factors" was added to the proposed provision so that sales could be made by one producer to another producer at preferential prices, thus preserving an industry practice by which short-line manufacturers were enabled to bid on business beyond the scope of their individual lines and to afford producers an avenue of relief in the case of manufacturing emergencies.(**)

It was the manifest desire of this Industry to provide by its Code for standardization and uniformity of Trade Practices, intended to simplify methods of marketing and curtail price cutting.

The "Gradation of Price Rates" provision (concerning a comparison of various competing metals) was intended to permit the establishment of price bases to apply to various Trade-Factors. It was not approved, a "Market Study" being substituted.

The "Gradation of Product Values" provision (concerning grades within each type of metal) was similarly designed, and was approved subject to future approval by the Administrator of indexes to be established.

A standard "quotation policy" was proposed and approved, requiring all Industry members to adhere to certain specified principles in making quotations, set forth in Section 4, Article IV, of the Approved Code as follows:

> "SEC. 4. Quotation policy. - (1) Each quotation shall define terms and conditions of sale.
>
> "(2) Each quotation shall be a firm proposal subject to revision only to correct errors; or, when permissible under conditions specified therein, to adjust to reflect changes in published prices.
>
> "(3) No member of the Industry shall quote a lump-

(*) Approved Code - Article IV, Section 1, Paragraph 5
(**) Research & Planning Report dated November 23, 1933, Volume B-III, Central Files

sum price on any schedule of products of this Industry which does not itemize, or which is lower than, the sum of such member's regular unit selling prices of the articles of comprising the schedule; and, when quoting a combined bid including purchased materials, no member of the Industry shall quote prices for such purchased material less than the published prices of the manufacturer thereof.

"From time to time the Code Authority, subject to the approval of the Administrator, may classify articles that are to be treated as units and/or groups of units within the meaning of this paragraph

"(4) No member of the Industry shall be permitted to revise any quotation on products of this Industry merely for the purpose of 'matching' or undercutting prices previously quoted by a competitor.

"(5) New schedules of prices shall be applicable to all non-contract business placed beginning as of the effective date thereof, the date of the placing of business by mail to be determined by the postmark.

"(6) No member of the Industry shall give advance notice to the trade of an intention to file revised prices on his products.

"(7) No member of the Industry shall predate any quotation nor accept any predated order or other contract."

Certain other provisions which have been discussed in previous sections of this report where they are of more primary interest, were designed to prevent price discrimination. Such provisions included the "Terms of Payment" provision, the "Terms of Shipment" provisions, the "Indeterminate Specifications" provision, the provision concerning the operation of factory warehouses, and the provision relating to sales of distress, surplus or obsolete merchandise. These provisions were designed to prevent the giving of price concessions or other privileges to certain purchasers by indirect means, when such privileges could not be granted directly, due to the necessity of conforming to filed price lists.

In addition to the various devices described above to prevent price discriminations, a further provision was proposed and approved under "Unfair Trade Practices" reading: (*)

"There shall be no extension of services or privileges to certain purchasers not extended to all purchasers of the same class under like terms and conditions."

The available files reveal no comments in regard to this Code provision.

(*) Approved Code - Article IV, Section 14, Paragraph 3 (c)

Exhibit No. 5

FIRE EXTINGUISHING APPLIANCE MANUFACTURING INDUSTRY

This is a small industry in which some 17 members control over three-fourths of the total dollar volume of production, (the 17 members voting on the Code Authority and its officers 1/, 2/). Some producers maintain branch offices and warehouses, while others maintain contract distributors. Through these agencies, sales were made to jobbers, who in turn sold to dealers and/or consumers. Some producers specialize in direct sales to dealers and consumers; others utilize jobbers for a major part of their output. Others use combinations of the two. Few manufacturers make a "complete line" and most of them purchase products of other members of this industry to supplement their own. 2/

The code program shows a desire on the part of the proponents to eliminate price competition both between manufacturers and between manufacturers and distributors, by the establishment of minimum list prices and the fixation of the uniform discounts therefrom, and requiring adherence thereto by manufacturers and distributors.

1. Customer Classification. The code defines a "distributor" as a purchaser of code products for resale advertising himself as the distributor for his manufacturers' products, functioning to all intents and purposes as a factory branch of the manufacturer in that trade area.3/

The Code Authority was authorized to establish definitions of other trade factors, these being resellers other than "distributors."4/ The Code Authority defined the different acceptable classes of customers, beginning with a revision of the definition of "distributor" by requiring that he carry in stock and sell the "standard brand" code products of his manufacturer, and permitting him to handle "other types of code products made by other manufacturers."5/ Thus distributors were non-exclusive, but presumably could not handle competitive products of different manufacturers.6/ The definition as interpreted by the Code Authority prevented a private brand contractor or wholesaler from being classed as a "distributor."7/ No manufacturer could appoint more than 85 distributors, nor more than 6 in any State.8/

The Code Authority also established classifications for jobbers, U.S. Government, very large users, dealers, and consumers.5/

The above definitions were informally approved by the Assistant Deputy Administrator then in charge of the code.9/

2. Trade Differentials. The code authorized the Code Authority to establish differentials for each class of trade, and this was done.4/ A distinction was first drawn between different types of manufacturers - those having a sales organization "national in its scope" were called Class A manufacturers; those having a "limited direct representation" through their own sales organization and dependent largely on independent distributors and mail order solicitation, were called Class B manufacturers. Class B manufacturer, depending more on jobbers than Class A manufacturers, were permitted to give jobbers a slightly greater discount than could be given by Class A.10/

The differentials established by the Code Authority, and informally approved by the Assistant Deputy Administrator then in charge of the code, were as follows:5/ 7/ 11/

To distributors by contract:

(a) 50/10 Six month terms, with extra compensation for sales made at 50/10.

or (b) 50/10/10 sixty day terms.

Old established fire protection companies (including automatic sprinkler manufacturers), distributing products under their own brand names:

50/10/10

Jobbers:

(a) 50/10/5 (From Class B manufacturers).

(b) 50/10 (From Class A manufacturers).

U. S. Government:

50/10

Very large users:

(a) VL type of product 50/10

(b) Other types of product 50

Dealers:

40

Consumers:

List (with discounts ranging up to 33-1/3 for certain types.)

It will be observed that "distributors" were given a large enough margin to enable them to sell to jobbers, the government, other very large users, and to dealers and consumers.

The jobbers of Class A manufacturers were given the same price as was given to the government and to very large users of certain types of products, which means that they were excluded from competition with their sources of supply in sales to these two classes of buyers. The jobbers of Class B manufacturers were given a margin of 5 per cent of their purchase price on which to operate on sales to the government and very large users.

With respect to other types of buyers - dealers and consumers - jobbers were given a sufficiently large margin on which to compete with direct selling manufacturers.

3. Resale Price Maintenance. The code prohibited the practice "continuing to supply any trade factor whose practices are fully proved to be destructive of the market at prices which enable him to continue destructive marketing".12/ The Code Authority interpreted this provision as prohibiting sales to trade factors guilty of violating the manufacturer's filed prices - which had to conform to the minimum price regulations subsequently discussed - to the classes of buyers to whom such trade factors sold. The Code Authority established a "distributor contract form" which must be entered into between manufacturer's and their distributors, requiring the distributor's adherence to the manufacturer's filed prices, among other things.6/ 8/ 13/

The N.R.A. later ruled that the clause above quoted did not, per se, require resale price maintenance, and that manufacturers were prohibited from selling to a trade factor only if and when the N.R.A. formally decided that such trade factor was guilty of destructive prices and practices.14/ 15/

4. Filed Prices. Each manufacturer must file prices and discounts and terms, plus a list of his "distributors".10/ 16/ 17/

5. Minimum Prices. The code authorized the Code Authority to establish a "lowest representative cost" for the various industry products, based on the cost of representative members of the industry.18/ The term "representative member" was defined in such a manner as to exclude all except the three or four highest-cost members of the industry.19/ The Code Authority fixed minimum prices on the basis of this "cost determination", and the Assistant Deputy Administrator then in charge of the code gave his approval thereto.20/

The program above described was evidently designed to eliminate price competition between manufacturers, raise prices, and protect direct selling manufacturers from price competition on the part of distributors. The elimination of price competition would be most advantageous to those members of the industry capable of engaging in extensive advertising campaigns and having well known brand names for which a consumer acceptance and demand had been built up; and to the disadvantage of those members not well equipped to compete on this basis. The extent to which quality differences exist in the products of this industry is not known, although it is believed that the largest selling items are well standardized, largely through insurance and governmental specifications.

Evidently the code program operated very effectively during its first few months.21/ Some five months after the perfection of the program the N.R.A. formally disapproved the actions taken by the Code Authority with respect to customer classification, fixed differentials and minimum prices.22/ This act resulted from protests by buyers and some of the members of the industry who had previously relied on their ability to undersell other producers to gain their access to the market. There was never as much publicity given the formal disapproval of the program as had been given to the preceding informal approvals, and it appears that the Code Authority was loathe to give up the program which had been developed.21/ In April, 1935, the Federal Trade Commission issued a complaint against the 17 members and officers of the Code Authority

charging that they had entered into a combination in February, 1932, to fix and maintain uniform prices; refrain from soliciting the customers of each other; refuse to sell to distributors; jobbers and dealers failing to maintain the resale prices set by manufacturers; agree upon prices to be bid where competitive bids were called for; procure withdrawal and cancellation of bids were at prices less than those agreed upon; and use other and similar means ... designed to suppress and prevent price competition. The complaint further charged that the respondents, under color of the code of fair competition for this industry, agreed among themselves in a assumed and pretended compliance with said code to fix and maintain uniform prices, and by virtue of such agreement competition has been suppressed; that the code did not authorize or permit price fixing and was not designed to permit price fixing by mutual agreement; that such combination and conspiracy resulted in suppression and prevention of competition and discriminated against small enterprises, and as such constituted unfair methods of competition in violation of the code.1/

In September, 1935, the respondents filed a consent answer, insisting that everything done by them was done under and pursuant to the code and in good faith, but consenting to the issuance of an order to cease and desist from the methods of competition alleged.1/

It is apparent that the industry program operated with a considerable degree of success in attaining the elimination of price competition between manufacturers and between manufacturers and distributors.

Footnotes:

1/ Federal Trade Commission Docket #2352.

2/ Minimum Price Unit Report on the Fire Extinguishing Appliance Manufacturing Industry.

3/ Article II, Secl 12 of Code.

4/ Article VI, Sec. 2 (f) of Code.

5/ Code Arthority Bulletin #11, Jan. 25, 1934 - (See Deputy's Folder #26.

6/ Code Authority Bulletin #7, Jan. 24, 1934 - (See Deputy's Folder #26).

7/ Code Authority Bulletin #25, March 20, 1934 - (See Deputy's Folder #26

8/ Minutes, Code Arthority Meeting Held March 10 and 11, 1934 - (See Deputy's Folder #23).

9/ December 13, 1933 - (See Deputy's Folder #9).

10/ Code Authority Bulletin #3, Jan. 20, 1934 - (See Deputy's Folder #26).

11/ Minutes, Code Authority Meeting held Nov. 12, 1934 - (See Deputy's Folder #23).

12/ Article VII, Sec. 11 of Code.

13/ Minutes, Code Authority Meeting held Jan. 6-8, 1934 - (See Deputy's Folder #23).

14/ Letter of Assistant Deputy, dated May 17, 1935 - (See Legal Division Folder on Prices),

15/ Letter by assistant Deputy to Code Authority, dated May 9, 1935 - (See Legal Division Folder on Prices).

16/ Article VIII of Code.

17/ Code Authority Bulletin #102, Feb. 18, 1935 - (See Deputy(s Folder #26).

18/ Article VI, Sec. 2 (e) of Code.

19/ Letter from Buffalo Fire Appliance Corporation, dated Oct. 13, 1933 - (See Volume A).

20/ Memo, Assistant Counsel Fuld to Assistant Deputy Hand, dated April 4, 1935 - (See Deputy(s Folder #12).

21/ Code History, pp. 8 and 9.

22/ Administrative Order No. 98-3A, dated June 7, 1934.

23/ For example, see correspondence between the General Fire Truck Corporation and Deputy Ammerman and Assistant Deputy Lane - (Central Files and Deputy's Folder #9).

OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION
THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title. I hereby appoint Leon C. Marshall, Director of the Division of Review.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority. the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code, and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, out also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histries, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the code, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Material Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, these materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
Foreign Trade under the National Industrial Recovery Act
  Part A - Competitive Position of the United States in International Trade 1927-29 through 1934.
  Part B - Section 3 (e) of NIRA and its administration.
  Part C - Imports and Importing under NRA Codes.
  Part D - Exports and Exporting under NRA Codes.
Forest Products Industries, Foreign Trade Study of the
Iron and Steel Industry, The
Knitting Industries, The
Leather and Shoe Industries, The
Lumber and Timber Products Industry, Economic Problems of the
Men's Clothing Industry, The
Millinery Industry, The
Motion Picture Industry, The
Migration of Industry, The: The Shift of Twenty-Five Needle Trades From New York State, 1926 to 1934
National Labor Income by Months, 1929-35
Paper Industry, The
Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January 1923, to date
Retail Trades Study, The
Rubber Industry Study, The
Textile Industry in the United Kingdom, France, Germany, Italy, and Japan
Textile Yarns and Fabrics
Tobacco Industry, The
Wholesale Trades Study, The
Women's Neckwear and Scarf Industry, Financial and Labor Data on

Women's Apparel Industry, Some Aspects of the

Trade Practice Studies

Commodities, Information Concerning: A Study of NRA and Related Experiences in Control
Distribution, Manufacturers' Control of: Trade Practice Provisions in Selected NRA Codes
Distributive Relations in the Asbestos Industry
Design Piracy: The Problem and Its Treatment Under NRA Codes
Electrical Mfg. Industry: Price Filing Study
Fertilizer Industry: Price Filing Study
Geographical Price Relations Under Codes of Fair Competition, Control of
Minimum Price Regulation Under Codes of Fair Competition
Multiple Basing Point System in the Lime Industry: Operation of the
Price Control in the Coffee Industry
Price Filing Under NRA Codes
Production Control in the Ice Industry
Production Control, Case Studies in
Resale Price Maintenance Legislation in the United States
Retail Price Cutting, Restriction of, with special Emphasis on The Drug Industry.
Trade Practice Rules of The Federal Trade Commission (1914-1936): A classification for comparison with Trade Practice Provisions of NRA Codes.

Labor Studies

Cap and Cloth Hat Industry, Commission Report on Wage Differentials in
Earnings in Selected Manufacturing Industries, by States, 1933-35
Employment, Payrolls, Hours, and Wages in 115 Selected Code Industries 1933-35
Fur Manufacturing, Commission Report on Wages and Hours in
Hours and Wages in American Industry
Labor Program Under the National Industrial Recovery Act, The
  Part A. Introduction
  Part B. Control of Hours and Reemployment
  Part C. Control of Wages
  Part D. Control of Other Conditions of Employment
  Part E. Section 7(a) of the Recovery Act
Materials in the Field of Industrial Relations
PRA Census of Employment, June, October, 1933
Puerto Rico Needlework, Homeworkers Survey

Administrative Studies

Administrative and Legal Aspects of Stays, Exemptions and Exceptions, Code Amendments, Conditional Orders of Approval
Administrative Interpretations of NRA Codes
Administrative Law and Procedure under the NIRA
Agreements Under Sections 4(a) and 7(b) of the NIRA
Approve Codes in Industry Groups, Classification of
Basic Code, the -- (Administrative Order X-61)
Code Authorities and Their Part in the Administration of the NIRA
  Part A. Introduction
  Part B. Nature, Composition and Organization of Code Authorities

Part C. Activities of the Code Authorities
Part D. Code Authority Finances
Part E. Summary and Evaluation
Code Compliance Activities of the NRA
Code Making Program of the NRA in the Territories, The
Code Provisions and Related Subjects, Policy Statements Concerning
Content of NIRA Administrative Legislation
Part A. Executive and Administrative Orders
Part B. Labor Provisions in the Codes
Part C. Trade Practice Provisions in the Codes
Part D. Administrative Provisions in the Codes
Part E. Agreements under Sections 4(a) and 7(b)
Part F. A Type Case: The Cotton Textile Code
Labels Under NRA, A Study of
Model Code and Model Provisions for Codes, Development of
National Recovery Administration, The: A Review of its Organization and Activities
NRA Insignia
President's Reemployment Agreement, The
President's Reemployment Agreement, Substitutions in Connection with the
Prison Labor Problem under NRA and the Prison Compact, The
Problems of Administration in the Overlapping of Code Definitions of Industries and Trades, Multiple Code Coverage, Classifying Individual Members of Industries and Trades
Relationship of NRA to Government Contracts and Contracts Involving the Use of Government Funds
Relationship of NRA with States and Municipalities
Sheltered Workshops Under NRA
Uncodified Industries: A Study of Factors Limiting the Code Making Program

Legal Studies

Anti-Trust Laws and Unfair Competition
Collective Bargaining Agreements, the Right of Individual Employees to Enforce
Commerce Clause, Federal Regulation of the Employer-Employee Relationship Under the
Delegation of Power, Certain Phases of the Principle of, with Reference to Federal Industrial Regulatory Legislation
Enforcement, Extra-Judicial Methods of
Federal Regulation through the Joint Employment of the Power of Taxation and the Spending Power
Government Contract Provisions as a Means of Establishing Proper Economic Standards, Legal Memorandum on Possibility of
Industrial Relations in Australia, Regulation of
Intrastate Activities Which so Affect Interstate Commerce as to Bring them Under the Commerce Clause, Cases on
Legislative Possibilities of the State Constitutions
Post Office and Post Road Power -- Can it be Used as a Means of Federal Industrial Regulation?
State Recovery Legislation in Aid of Federal Recovery Legislation History and Analysis
Tariff Rates to Secure Proper Standards of Wages and Hours, the Possibility of Variation in
Trade Practices and the Anti-Trust Laws
Treaty Making Power of the United States
War Power, Can it be Used as a Means of Federal Regulation of Child Labor?

THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of those studies follows:

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, Payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:
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Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry

THE COVERAGE

The original, and approved, plan of the Division of Review contemplated resources sufficient (a) to prepare some 1200 histories of codes and NRA units or agencies, (b) to consolidate and index the NRA files containing some 40,000,000 pieces, (c) to engage in extensive field work, (d) to secure much aid from established statistical agencies of government, (e) to assemble a considerable number of experts in various fields, (f) to conduct approximately 25% more studies than are listed above, and (g) to prepare a comprehensive summary report.

Because of reductions made in personnel and in use of outside experts, limitation of access to field work and research agencies, and lack of jurisdiction over files, the projected plan was necessarily curtailed. The most serious curtailments were the omission of the comprehensive summary report; the dropping of certain studies and the reduction in the coverage of other studies; and the abandonment of the consolidation and indexing of the files. Fortunately, there is reason to hope that the files may yet be cared for under other auspices.

Notwithstanding these limitations, if the files are ultimately consolidated and indexed the exploration of the NRA materials will have been sufficient to make them accessible and highly useful. They constitute the largest and richest single body of information concerning the problems and operations of industry ever assembled in any nation.

L. C. Marshall,
Director, Division of Review.

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